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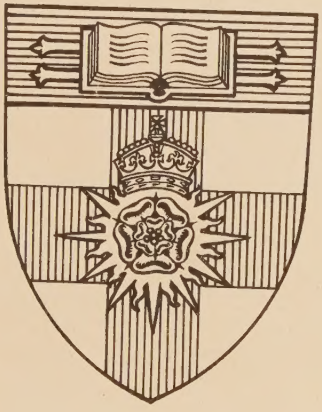

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1914.

THE

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AND

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MEMORANDA.

1913.

Dec. 19. Sir Walter George Frank Phillimore, Baronet, *a Lord Justice of Appeal, was sworn of the Privy Council, and took his place accordingly.*

1914.

Jan. 9. The Right Honourable Sir Rufus Daniel Isaacs, *K.C.V.O., Lord Chief Justice of England, was created a Baron by the style of* Baron Reading of Erleigh, *in the county of Berks.*

Jan. 19. Sir Charles Alfred Cripps, K.C.V.O., K.C., *was created a Baron by the style of* Baron Parmoor of Frieth, *in the county of Buckingham.*

Jan. 24. The Right Honourable Charles Alfred Baron Parmoor, *having been previously sworn of the Privy Council, was appointed a member of the Judicial Committee under* 3 & 4 *Will.* 4, *c.* 41, *s.* 1.

February. The Honourable Sir Thomas Townsend Bucknill, *one of the Justices of the High Court of Justice, resigned his office on account of ill health. He was afterwards sworn of the Privy Council.*

April. The Right Honourable Sir Roland Vaughan Williams, *a Lord Justice of Appeal, and* The Honourable Sir Arthur Moseley Channell, *one of the Justices of the High Court of Justice, resigned their offices respectively.*

April 23. The Honourable Mr. Justice Pickford *was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council.* Montague Shearman, K.C., *and* John Sankey, K.C., *were appointed respectively to be Justices of the High Court of Justice, and were afterwards knighted.*

May 14. The Right Honourable Sir Joshua Strange Williams, *late senior puisne judge of the Supreme Court of New Zealand,* Sir William Pickford, *Lord Justice of Appeal, and* Sir Arthur Moseley Channell *having been sworn of the Privy Council took their places accordingly.*

July 1. The Right Honourable Sir Herbert Cozens-Hardy, *Master of the Rolls, was created a Baron by the style of* Baron Cozens-Hardy of Letheringsett, *in the county of Norfolk.*

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1914.

Viscount *Haldane*, Lord Chancellor.
Earl of *Halsbury*.
Earl *Loreburn*.
Viscount *Morley of Blackburn*, Lord President.
*Earl *Beauchamp*, Lord President.
Lord *Dunedin*.
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Sir *Joshua Williams*.
Syed *Ameer Ali*, C.I.E.

And others who being present or past Lords Justices of Appeal are members of the Privy Council (44 *Vict. c.* 3), *or who being members of the Privy Council hold or have held high judicial office* (50 *&* 51 *Vict. c.* 70).

* Succeeded Viscount *Morley of Blackburn* in August, 1914.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

GREAT CENTRAL RAILWAY COMPANY . APPELLANTS; H. L. (E.)*

AND 1913

MIDLAND RAILWAY COMPANY . . . . RESPONDENTS. *Oct.* 24.

Railway Company—Running Powers for General Traffic—Junction with Owning Company's Line by Third Company for Limited Traffic—Amalgamation of Third Company with Running Company—Right to use Junction for General Traffic—Effect of Amalgamation—Railways Clauses Act, 1863 (26 & 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

In 1897 the Great Central Railway Company, as successors to the Manchester, Sheffield and Lincolnshire Railway Company, acquired general running powers over the Midland Railway Company's branch line from M. to W. The Derbyshire Railway Company, whose line crossed the Midland branch line at S., under a special Act of 1897 constructed a short line (called the S. curve) and a junction connecting their line with the Midland branch line at S., and, under an agreement with the Midland Company, acquired limited running powers over a small portion of the Midland line lying between the junction and a certain colliery for coal traffic to and from the colliery by way of the S. curve and junction. In 1906 the undertaking of the Derbyshire Company was transferred to the Great Central Company under a special Act which incorporated the amalgamation provisions of the Railways

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* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ATKINSON, LORD MERSEY, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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H. L. (E.)
1913
GREAT CENTRAL RAILWAY v. MIDLAND RAILWAY.

Clauses Act, 1863, and the Derbyshire Company was dissolved. The Great Central Company, as owners of the Derbyshire Company's undertaking, claimed the right to bring general traffic over the S. curve and junction and then, by virtue of their general running powers, to pass such traffic over the Midland line between M. and W.:—

Held, that the effect of the amalgamation sections of the Railways Clauses Act, 1863, was to confine the Great Central Company to the exercise of such running powers as the Derbyshire Company possessed at the time of the amalgamation, and that the claim failed.

Decision of the Court of Appeal [1912] 1 Ch. 206, affirmed.

Midland Ry. Co. v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841, distinguished.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Neville J. (2) The facts are fully stated by reference to a plan in the report of the case before Neville J. They may be summarized as follows.

Under powers conferred by the Midland Railway (Mansfield, &c., Lines) Act, 1865 (28 & 29 Vict. c. ccclix.), the respondents constructed a railway running north and south between Mansfield and Worksop and terminating towards the north at or near Worksop by a junction with the Manchester, Sheffield and Lincolnshire Railway known as Shireoaks Junction. By s. 29 of the Act running powers were given to the Manchester, Sheffield and Lincolnshire Railway Company for all kinds of traffic (exclusive of local traffic) "over the portion of the railway of the (respondent) company by this Act authorized between Worksop or Shireoaks and Mansfield," and correlative running powers were given to the respondent company over so much of the Manchester, Sheffield and Lincolnshire Railway as lay between Shireoaks and Retford. The payment to the owning company for this accommodation was to be a mileage proportion of the through rates, less payments to other companies and the usual clearing house and other terminals and an allowance of $33\frac{1}{3}$ per cent. to the running company for working expenses.

By s. 80 of the Great Central Railway Act, 1897 (60 Vict. c. liv.), the undertaking of the Manchester, Sheffield and Lincolnshire Railway was renamed the Great Central Railway and the company owning the same became the appellant company.

Under the powers of the Lancashire, Derbyshire and East

(1) [1912] 1 Ch. 206. (2) [1911] 2 Ch. 173.

Coast Railway Act, 1891 (54 & 55 Vict. c. clxxxix.), the Lancashire, Derbyshire and East Coast Railway Company (hereinafter called the Derbyshire Company) constructed a railway running east and west parallel to the main line of the Manchester, Sheffield and Lincolnshire Railway Company, but a few miles to the south of it, and crossing the Mansfield and Worksop railway at a point near Shirebrook.

By the Lancashire, Derbyshire and East Coast Railway Act, 1897 (60 & 61 Vict. c. lvi.), the Derbyshire Company were authorized to construct a short line known as the Shirebrook curve and to form a junction called Shirebrook Junction with the respondent company's line between Shireoaks and Mansfield, and by s. 26 of the Act the Derbyshire Company and the respondent company were authorized to enter into agreements with respect (inter alia) to the management, regulation, interchange, collection, transmission, and delivery of traffic upon, or coming from, or destined for the railways of the contracting companies, and the fixing of tolls and rates arising from traffic to, from, and over the railways of the contracting companies.

Shortly after the passing of this Act the line was constructed and the junction effected with the respondent company's line, and for this purpose the respondent company granted to the Derbyshire Company an easement over a small portion of their line. By an agreement dated February 1, 1898, between the respondent company and the Derbyshire Company running powers were given to the Derbyshire Company over so much of the Mansfield and Worksop railway as lay between Shirebrook Junction and the Shirebrook Colliery, which was situated a short distance to the south of the junction, subject to a toll of 3*d.* per ton (reduced to 2*d.* per ton by a subsequent agreement). Shirebrook Junction was used in connection with these running powers and also for the interchange of traffic between the Derbyshire Company and the respondent company.

By the Great Central and Derbyshire Railways Act, 1906 (6 Edw. 7, c. lxxvii.), which incorporated, amongst other Acts, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and Part V. (relating to amalgamation) of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), the whole undertaking of the

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Derbyshire Company was transferred to and vested in the appellant company and the Derbyshire Company was dissolved.

During the proceedings before Parliament which led up to the passing of this Act the respondent company strongly opposed the proposed transfer to the appellant company of the undertaking of the Derbyshire Company, but they withdrew their opposition upon the terms of an agreement, dated June 15, 1906, and made between the appellant company and the respondent company and confirmed by the Act. By clause 4 of this agreement provision was made for the payment to the respondent company of the toll of 2*d.* per ton in respect of the colliery traffic above referred to.

Shortly after the passing of the Act of 1906 the appellant company adopted the route via Shirebrook Junction for general traffic to and from places on the respondent company's Mansfield and Worksop railway and for that purpose ran off and on the said railway at Shirebrook Junction and passed over and used the railway with their engines, carriages, and trucks. The respondent company objected that the running powers of the appellant company over the Mansfield and Worksop line via Shirebrook Junction were limited to those previously possessed by the Derbyshire Company. Thereupon the appellant company brought an action against the respondent company for a declaration that they were entitled to exercise running powers for all their traffic over the Mansfield and Worksop railway and over any part thereof and for that purpose to run on and off the said railway by way of Shirebrook Junction.

Neville J. made the declaration asked for with the proviso that the right should be subject, with regard to traffic to and from the Shirebrook Colliery, to the agreement of June 15, 1906. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) reversed this decision and dismissed the action.

1913. Oct. 21, 22, 24. *Sir Alfred Cripps, K.C.*, and *C. E. E. Jenkins, K.C.* (with them *Cozens-Hardy, K.C.*, and *Hugh Bischoff*), for the appellants. This case is governed by the principle of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1), which has been

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followed ever since. That principle is that where a railway company has general running powers over the line of another company and gets physical access to that line at any point it may use those running powers wherever it can get the physical access, subject, of course, to any overriding limitation. The appellants having got physical access to the Mansfield line at Shirebrook Junction, they are entitled to use in connection with that junction the general running powers which they acquired from the respondents by the Act of 1865. The Railways Clauses Consolidation Act, 1845, contains no provision as to running powers, but it gives to other companies a right of user over a railway, subject to the payment of a toll. That system was found to be impracticable, and, consequently, if other companies come on to a railway at all, provision is made in the special Act for the granting of running powers, while reserving to the owning company complete control over the traffic of the running company, subject to arbitration. It was held by the Court of Appeal that the rights of the appellants were cut down by the terms of the Amalgamation Act, but that is a misapprehension. What the appellants got by the amalgamation was an access to a line over which aliunde they had general running powers. Suppose the Derbyshire Company had simply got access to the Mansfield line there could have been no doubt as to the rights of the appellants, and the fact that the company got access to the line plus limited running powers does not affect the question. The two rights are wholly independent of each other. Neither the Act under which the Derbyshire Company obtained a right of access to the respondents' railway nor the agreement conferring the limited running powers contains any limitation whatever as to the user of the junction, and the Amalgamation Act leaves the running powers of the appellants as they were before. Sect. 38 of the Railways Clauses Act, 1863, shews that the appellants cannot derive as the successors of the Derbyshire Company any greater rights than the Derbyshire Company had, but they are not claiming to exercise their running powers as the successors of the Derbyshire Company. Suppose the appellants acquired from the Derbyshire Company running powers over part of the Derbyshire line including the Shirebrook

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curve, that would have brought this case exactly within *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) Then, are they in a worse position because, instead of those limited powers, they have acquired the whole rights of the Derbyshire Company by amalgamation? [They also referred to an unreported case of *Midland Ry. Co.* v. *Great Western Ry. Co.*, (H. L.) July 9, 1909, in which the principle of the earlier case was confirmed.]

Upjohn, K.C., and *F. H. Schwann*, for the respondents. 1. *Midland Ry. Co.* v. *Great Western Ry. Co.* (1) turned upon the construction of a particular agreement and established no general principle, and, upon any view of that decision, it has no application to the present case by reason of the amalgamation sections of the Railways Clauses Act, 1863. The object of the Legislature was to lay down once and for all that the amalgamating company was not in respect of the undertaking which it acquired by the amalgamation to have any greater rights than the company which it absorbed. The intention was that other companies were not to be affected by the amalgamation. But it is precisely in respect of running powers that other companies are most likely to be affected. The appellants bought off the opposition of the respondents to the amalgamation upon the terms of the agreement of February, 1898, remaining in force, and in effect they became a party to that agreement. So far as the undertaking of the Derbyshire Company is concerned the appellants stand in the shoes of that company and subject to all the obligations of that company. They cannot claim to run on and off at Shirebrook Junction because they can only make that claim by virtue of the amalgamation. The access has been acquired by the appellants solely as the representatives of the Derbyshire Company, and the general running powers granted in 1865 do not apply to a new undertaking to which they did not apply before. [They referred to ss. 36, 37, 38, 39, 41, and 55 of the Railways Clauses Act, 1863.] Farwell L.J.'s judgment expresses the respondents' argument. By s. 38 of the Railways Clauses Act, 1863, the undertaking, powers, and privileges of the dissolved company are to be held, used, exercised, and enjoyed by the amalgamating company in

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the same manner and to the same extent as the same were held, used, exercised, and enjoyed by the dissolved company. But the appellants are claiming to use the powers of the Derbyshire Company to a greater extent than they were used before and in a different manner.

2. Upon the construction of the special Act of 1865 the running powers are between two defined termini only. Although the appellants may set down passengers at intermediate stations the trains must run the whole distance from Shireoaks to Mansfield.

Sir Alfred Cripps, K.C., replied.

VISCOUNT HALDANE L.C. My Lords, in this case the appellants brought an action against the respondents for the purpose of obtaining a declaration that the appellants were entitled to exercise running powers for all their traffic on the Mansfield and Worksop line of the respondent company and any part thereof, and for that purpose to run off and on the said line by way of Shirebrook Junction, subject as regards certain traffic to the conditions of a particular agreement.

My Lords, the Great Central Railway Company is a company which has been formed by the amalgamation of other lines with a part that was originally its own. It incorporated with itself the undertaking of the Manchester, Sheffield and Lincolnshire Railway Company in 1897, and much later, in 1906, it incorporated with itself the undertaking of the Lancashire, Derbyshire and East Coast Railway Company, which I will call for short the Derbyshire Company.

My Lords, Mansfield Junction lies at one end of a stretch of line which belongs to the Midland Railway Company, and at the other end is the point of junction with the line of the old Manchester, Sheffield and Lincolnshire Railway. Under an Act of 1865 the old Manchester, Sheffield and Lincolnshire Railway Company had running powers, exclusive of local traffic, over the stretch of Midland line to which I have referred, and these powers passed in 1897 to the Great Central Company. The Derbyshire Company had formed a junction, subject to certain restrictions, at a point called Shirebrook upon the

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Midland line, and the question which now arises is whether the Great Central Company, having succeeded to the powers, not only of the Derbyshire Company in respect of this junction but of the Manchester, Sheffield and Lincolnshire Company, are able to use the running powers of the old Manchester, Sheffield and Lincolnshire Company over the whole of that stretch for the purpose of bringing on to the Midland line the traffic which they may collect from various quarters at Shirebrook Junction.

My Lords, the whole question turns upon the construction of the Railways Clauses Act, 1863, which contains the general clauses which are ordinarily incorporated in railway amalgamations; and the point which arises is whether the sections which that Act contains are sufficient to confine the appellant company, as representing the Derbyshire Railway Company, to that extent and no more of user and of running powers over the Midland section which was possessed by the Derbyshire Company themselves. It is plain that the Derbyshire Company had not these general running powers over the Midland section which the Manchester, Sheffield and Lincolnshire Company possessed, and, on the other hand, at the time when the Great Central Company took over the undertaking of the Manchester, Sheffield and Lincolnshire Company, they had not got the powers of the Derbyshire Company which they took over in 1906.

My Lords, the case went before Neville J. on the claim of the appellants to obtain the declaration to which I have referred, and Neville J. decided in their favour; he thought that the case was really governed by the case of *Midland Ry. Co.* v. *Great Western Ry. Co.* (1), in which a company that had got all the rights of another company, including a junction with full powers to that other company to get on to the Great Western line, and which also itself possessed running powers over the Great Western, was held to have full running powers over the part of the Great Western line which was in question. But obviously in that case the rights were very different from the rights here. In that case there were the fullest rights in existence.

Farwell L.J., in distinguishing that case, points out that what we have here is a question of a quite different kind, turning on

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the terms of an amalgamation. Objections were raised by the respondents to the amalgamation with the Derbyshire Company at the time when the negotiation for it took place, and these objections were got over by inserting the sections of the Act of 1863, under which the Great Central, the amalgamating company, got nothing more as against the Midland than the amalgamated company, the Derbyshire, had before the amalgamation. Then he goes on to point out that by s. 38 of the Act of 1863 the undertaking, rights, powers, and so on, of the Derbyshire Company became vested in the appellants and were to be held, used, exercised and enjoyed by them in the same manner and to the same extent as was the case at the time of the amalgamation.

Now, my Lords, the point becomes a very simple one if you once come to the conclusion that the rights of user of the amalgamating company, that is to say, the Great Central, are not to be greater in respect of the powers as regards this junction than the rights which existed at the time when the Derbyshire Company themselves possessed those rights. We are not dealing here with any question of facilities. We are dealing with what is quite different, a question of running powers; we are dealing with a question of user in that sense only. I am unable to come to any other conclusion than that Farwell L.J. and the Court of Appeal were right in construing the sections of the Act of 1863 as confining the Great Central Company to the exercise of such running powers—and of no more—as the Derbyshire Company possessed at the time of the amalgamation. If that is so, then, as the Derbyshire Company did not possess these rights, the claim on which the action is put forward was not well founded and the judgment of Neville J. was consequently wrong. I agree entirely with the view taken by the Court of Appeal and especially with the reasoning of Farwell L.J., and I consequently move your Lordships that the appeal be dismissed with costs.

EARL OF HALSBURY. My Lords, I concur. I do not feel disposed to differ in any respect from the judgment given by Farwell L.J. in the Court below.

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LORD ATKINSON. My Lords, I concur.

LORD MERSEY. My Lords, I agree. I think that the reasons adduced by Farwell L.J. in the Court below clearly shew that the Great Central Railway Company had not before the amalgamation the rights they now claim, and nothing has happened since to shew that they have acquired them.

LORD PARKER OF WADDINGTON. My Lords, I agree. It appears to me that the real distinction between this case and the Hereford case (*Midland Ry. Co.* v. *Great Western Ry. Co.* (1)) is that in the Hereford case the new access had been acquired for the purposes of the company which had the general running powers and therefore could naturally be used in connection with those running powers. In the present case, however, the new access has not in any sense been acquired for the purposes of the undertaking of the Great Central Company as it existed prior to the amalgamation; it has been acquired only for the purposes of the undertaking transferred upon the amalgamation; and therefore having regard to s. 38 of the Railways Clauses Act, 1863, it appears to me that it cannot be used in connection with the running powers which formerly attached only to the Great Central Railway Company.

LORD SUMNER. My Lords, I am of the same opinion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 24, 1913.

Solicitor for appellants: *D. H. Davies.*
Solicitors for respondents: *Beale & Co.*

(1) L. R. 8 Ch. 841.

Applied. SCOTTISH INSURANCE CORPN. LTD. *v.* WILSONS AND CLYDE COAL CO., LTD. [1949] 1 All E.R. 1068.

[HOUSE OF LORDS.]

WILL . . . . . APPELLANT; AND UNITED LANKAT PLANTATIONS COMPANY, LIMITED AND ANOTHER . . . RESPONDENTS.

H. L. (E.)* 1913 *Oct.* 27.

Company—Preference Shares — Ordinary Shares— Distribution of Profits— Rights of Shareholders inter se.

A company which had power under its articles to issue new shares upon such terms, including preference, as the company in general meeting might direct passed a resolution that the capital of the company be increased by the issue of certain new shares to be called preference shares and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares, and that such preference shares should rank, both as regards capital and dividend, in priority to the other shares. Preference shares were issued in accordance with this resolution. The articles further provided that, subject to any priorities that might be given upon the issue of any new shares, the profits of the company available for distribution should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively:—

Held, that in the distribution of profits holders of the preference shares were not entitled to anything more than a 10 per cent. dividend.

Decision of the Court of Appeal [1912] 2 Ch. 571, affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Joyce J. (1)

The question raised by this appeal was whether upon the true construction of a resolution of the respondent company passed on July 13, 1891, for the creation of preference shares, and of the company's articles of association, the preference shareholders were entitled only to receive a cumulative dividend at the rate of 10 per cent. on the amount paid on the shares or were entitled to participate further in the profits of the company available for dividend.

* *Present:* VISCOUNT HALDANE L.C., EARL LOREBURN, LORD KINNEAR, and LORD ATKINSON.

(1) [1912] 2 Ch. 571.

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The company was registered on March 20, 1889, under the Companies Acts, 1862 to 1886. By clause 5 of the memorandum of association the capital of the company was fixed at 400,000*l.*, divided into 400,000 shares of 1*l.* each, with power to increase, and it was provided that the shares forming the capital (original or increased) of the company might be divided into such shares with such preferences and other special incidents and be held upon such terms as might be provided by the regulations of the company for the time being.

The articles of association of the company, so far as material, provided as follows:—

"42. The Board may, with the sanction of a general meeting of the company, from time to time increase the capital of the company by the issue of new shares."

"43. Such new shares shall be of such amount, and shall be issued for such consideration, on such terms and conditions, and (subject to the provisions hereinafter contained as to the consent of the holders of any class of shares where such consent is necessary) with such preference or priority as regards dividends or in the distribution of assets, or as to voting or otherwise over other shares of any class, whether then already issued or not, or as shares to be deferred to any other shares with regard to dividends or in the distribution of assets as the company in general meeting may direct, and subject to, or in default of any such direction, the provisions of these articles shall apply to the new capital in the same manner in all respects as to the original capital of the company."

"113. The board may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies or for equalising dividends, or for repairing or maintaining any property of the company, or for any other purposes of the company, and the same may be applied accordingly from time to time in such manner as the board shall determine, and may without placing it to reserve carry over any profits which they think it not prudent to divide."

"114. The company in general meeting may declare a dividend to be paid to the members according to their rights

and interests in the profits but no larger dividend shall be declared than is recommended by the board."

"115. Subject to any priorities that may be given upon the issue of any new shares the profits of the company available for distribution (having regard to the provisions hereinbefore contained as to a reserve fund) shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively."

Of the original capital of the company there had been issued up to the present time 240,000*l.* divided into 240,000 ordinary shares of 1*l.* each, all fully paid up.

In the summer of 1891, the company being in temporary want of money, it was proposed to increase the capital of the company.

Accordingly, at an extraordinary general meeting of the company held on July 13, 1891, the following resolutions were passed:—

"(1.) That the capital of the company be increased to 450,000*l.* by the creation of 50,000 new shares of 1*l.* each:

"(2.) That the new shares be called preference shares and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such preference shares rank, both as regards capital and dividend, in priority to the other shares."

In pursuance of the last mentioned resolution the company issued 20,000 preference shares, all fully paid up. Of these shares the appellant was the registered holder of 419.

In 1909 the directors were contemplating a sale of a substantial part of the company's property and business to a new company and proposed to divide the profit on the transaction among the ordinary shareholders, excluding the preference shareholders from the distribution.

On July 19, 1910, the appellant, on behalf on himself and all other holders of preference shares in the company, commenced an action against the respondent company and the respondent H. H. Nelson, who was appointed to represent the interests of the ordinary shareholders of the company, to obtain (inter alia)

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a declaration that the preference shares were entitled to rank for dividend pari passu with the ordinary shares as against any profits of the company available for distribution as dividends after providing for a cumulative dividend of 10 per cent. on the preference shares and a dividend of 10 per cent. on the ordinary shares.

Joyce J. made a declaration to this effect, but the Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.) reversed this decision and held that the preference shareholders were not entitled to any further participation in the profits of the company, whilst a going concern, beyond the 10 per cent. cumulative dividend on the amount for the time being paid up on such shares.

Sir Robert Finlay, K.C., and *T. B. Morison, K.C.* (of the Scottish and also of the English Bar) (with them the *Hon. A. Shaw*), for the appellants. The resolutions creating the preference shares were passed under the authority of articles 42 and 43, but those resolutions do not profess to deal with the distribution of the profits, which is regulated by article 115. That article contemplates the creation of preference shares and provides that, subject to any priorities, the profits available for dividend are to be distributed among the members in accordance with the amounts paid on their shares. That means that any surplus profits after paying a cumulative dividend of 10 per cent. on the preference shares and a dividend of 10 per cent. on the ordinary shares are to be divided amongst all the shareholders. The second resolution, which describes the nature of the new shares, was not intended to derogate in any way from the right to participate conferred by article 115. The object of that resolution was not to fix the dividend but to define the preference.

The question of the right of the preference shareholders to participate in the surplus profits depends simply upon the construction of the articles and resolutions. There is no rule of law that shareholders entitled to a preferential dividend are entitled to nothing more. See *In re Bridgewater Navigation Co.* (1), per North J. That case, which related to the

(1) (1888) 39 Ch. D. 1, at p. 12.

distribution of the assets in a winding-up, was taken to the House of Lords (1), but the judgments contain nothing which affects the dictum of North J. as to the right of the preference shareholders to participate in the surplus profits. See also *In re Espuela Land and Cattle Co.* (2), per Swinfen Eady J., and *Henry* v. *Great Northern Ry. Co.* (3), per Lord Cranworth. In Palmer's Company Precedents, 11th ed., pt. i., p. 814, which may be cited as shewing the views of the profession on the subject, the question is treated as an open one. The second resolution follows Form 185 in the 5th edition of Palmer except that the word "fixed" before the words "cumulative preferential dividend" is omitted. That omission is important in view of the distinction drawn by North J. in the *Bridgewater Case.* (4)

Upjohn, K.C., Gore Browne, K.C., and *H. E. Wright*, for the respondents, were not called upon.

VISCOUNT HALDANE L.C. My Lords, this appeal raises a question of great interest from a business point of view, but it is difficult to see how it can be said to raise any question of general legal principle. The point in dispute is one of construction, and construction must always depend on the terms of the particular instrument; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority has been cited in the course of the argument, and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us.

My Lords, the action was brought by the appellant to obtain a declaration—and this is the only substantial point before the House—that the preferential shares which have been issued were entitled to rank for dividend pari passu with the ordinary shares of the company as against any profits of the company available for distribution as dividend after providing for a cumulative

(1) (1889) 14 App. Cas. 525.
(2) [1909] 2 Ch. 187, at p. 193.
(3) (1857) 1 De G. & J. 606, at p. 636.
(4) 39 Ch. D. 1, at p. 12.

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preferential dividend of 10 per cent. on the preference shares and a dividend of 10 per cent. on the ordinary shares. That was the claim and that was the point of controversy between the parties.

Now, my Lords, to see how the question so raised ought to be answered, it is necessary to turn to the documents which constituted the company. There is nothing special in the memorandum of association, but the articles contain provisions which are very material. [His Lordship read articles 42 and 43.]

Pausing there, your Lordships will observe that the company in general meeting is to give a direction, which is to be carried out by the board, as to the terms and conditions on which the new capital is to be issued and as to the preference and priority with regard to dividends, distribution of assets, and so on, which may be attachable to the shares. That, my Lords, is the authority under which these shares were issued, and the only other articles that I propose to read are articles 113, 114, and 115. [His Lordship read them.]

My Lords, article 115 I read as the provision which is directed to the duty of the company in the distribution of the surplus profits remaining after the reserve fund has been set aside. It prescribes that what remains should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively. But that is subject to any priorities that may be given on the issue of any new shares, and it is also obviously subject—there is no controversy about its being so subject—to the paramount provisions of article 43 which declare the powers of the company and of the board to define the terms and conditions upon which new shares may be issued; and it is to article 43 that one must turn for the authority for the resolutions which were passed in a general meeting of the company on July 13, 1891, and which gave rise to the issue of the new shares. [His Lordship read the resolutions.]

Your Lordships will observe that the second resolution gave the authority to make the bargain and defined the terms which the bargain was to contain. A shareholder comes to the company and says "I wish to contract with you for a share in your capital and so to become a shareholder." He advances his

money and the terms are contained in the bargain that is made between him and the company on the issue of the share to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of 10 per cent. on the amount paid up on his share and that his preference share is to rank both as regards capital and dividend in priority to other shares.

My Lords, I should have thought that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced saying "You are to have a cumulative preferential dividend of 10 per cent." or whatever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point. You do not look outside a document of this kind in order to see what the bargain is; you look for it as contained within the four corners of the document. And, although it is quite true that in article 115 the phrase is "Subject to any priorities that may be given upon the issue of any new shares, the profits of the company available for distribution (having regard to the provisions hereinbefore contained as to a reserve fund) shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively," the real question is whether the documents have been silent as to the terms of distribution. If I am right the resolution was passed under the powers contained in article 43, and that defined the whole terms of the bargain between the shareholders and the company; and there is no room for saying that the general provisions of article 115 operate in a fashion in which they can only operate if the matter is not covered by express provision.

My Lords, I think that Farwell L.J. called attention to what is really a cardinal consideration in this matter. Shares are not issued in the abstract and priorities then attached to them; the issue of shares and the attachment of priorities proceed uno flatu; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue. And when you do find these things prescribed it certainly appears to me unnatural to go beyond them, and to look to the general provisions of an article which is

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only to apply if nothing different is said. Moreover I think that when you find—as you do find here—the word "dividend" used in the way in which the expression is used in the resolution and defined to be "a cumulative preferential dividend" you have something so definitely pointed to as to suggest that it contains the whole of what the shareholder is to look to from the company. And I think that is borne out by the concluding words of the resolution of July 13, 1891, to which I have just referred, namely, that the preference shares are to rank "both as regards capital and dividend in priority to the other shares." That is appropriate when the provision is for a cumulative preferential dividend at a fixed amount such as I have stated. It is not a natural expression if the rights are to be such as the appellant has asked us to infer.

My Lords, this case, as I have said, is a case of importance, and if I thought that by taking time I could have come to any other conclusion than the one at which I have arrived, I would have asked your Lordships to postpone the delivery of judgment. But my own mind is quite clear upon the subject. I think the Court of Appeal were right and that Joyce J. was wrong, and I therefore move your Lordships that the appeal be dismissed, and dismissed with costs.

EARL LOREBURN. My Lords, I am entirely of the same opinion. The question is whether this resolution in the light of the articles means that the preference shareholders were to have simply the dividend as described in the resolution, or means that they are to receive something more because of their character of being shareholders.

My Lords, I do not think that any light can be thrown upon the construction of this particular resolution by considering language that was used, whether by way of decision or of conjecture, in the construction of perfectly different contracts by other learned judges. There is nothing more unfortunate than the tendency which appears to influence some minds that you can attain to certainty in the interpretation of one set of sentences by considering the analogy of other different sentences. In my opinion you must construe the language of a contract as

it stands, making allowance for the use of words which are words of art or which have been actually construed as they stand by Courts of law.

My Lords, I have no doubt myself in regard to this particular resolution, that the people who took the preference shares under it knew perfectly well that they were taking shares with a preferential dividend of 10 per cent. I think they would have been rather surprised, although no doubt they would have been gratified, if they had been told that they were about to receive the almost boundless additional advantages which have been held out to them in the arguments we have been hearing. This is really an attempt to add to the terms of the contract by screwing something out of the articles which the framers of the contract I do not believe ever thought of; at all events they have stated their contract. It speaks for itself upon this particular subject and ought not to be added to.

LORD ATKINSON. My Lords, I concur. I think if one had to construe the second of these resolutions one would naturally come to the conclusion that the dividend prescribed was the only dividend the shareholder was to receive. It is said that the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that construction. I therefore think that the decision of the Court of Appeal was right and should be upheld.

LORD KINNEAR. My Lords, I am entirely of the same opinion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 27, 1913.

Solicitors for appellant: *Coward & Hawksley, Sons & Chance.*
Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

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PRICE AND OTHERS . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Charity—National School—Conveyance of Site under the School Sites Act, 1841 (4 & 5 *Vict. c.* 38)—*Trust for the Education of the Poor in the Principles of the Established Church—Failure of Special Trust—Scheme for the Regulation of the Charity.*

Orders of the Court of Appeal and of Swinfen Eady J. [1912] 1 Ch. 667, discharged, and a new scheme substituted by consent.

APPEAL from an order of the Court of Appeal reversing an order of Swinfen Eady J. (1)

A school was erected at Caerphilly in Glamorganshire upon land conveyed by a deed poll dated December 31, 1867, to trustees under the authority of the School Sites Act, 1841, upon trust to permit the land and buildings to be erected thereon to be for ever appropriated and used "as and for the education of children and adults or children only of the labouring, manufacturing, and other poorer classes in the district of Caerphilly and for no other purpose," and the deed provided that the school should always be "conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church." The school was carried on in accordance with the trusts of the deed until 1905, when in consequence of the inability of the trustees to satisfy the requirements of the education authorities under the Education Act, 1902, it was closed.

In an action by the respondent, the Attorney-General, at the relation of the Glamorgan County Council, against the appellants, the trustees of the charity, for the administration of the trusts affecting the school, a scheme for the regulation and management

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(1) [1912] 1 Ch. 667.

of the charity was prepared by the Attorney-General, and it was thereby provided that the school buildings should be used in the first instance for Church of England educational purposes and subject thereto for undenominational educational purposes.

Upon objection by the appellants, Swinfen Eady J. modified the scheme by giving the trustees power to let the buildings and apply the net receipts for Church educational purposes.

The Attorney-General appealed, and the Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton L.J., Buckley L.J. dissenting), being of opinion that the special trusts for carrying on the school in connection with the Church of England had failed and that the premises ought to be appropriated and used generally for the education (whether purely secular or not) of the class mentioned in the deed poll, discharged the order of the learned judge and ordered that it be referred back to him to settle a scheme on this footing.

1913. July 17, 18. *Sir R. Finlay, K.C.*, and *P. S. Stokes*, for the appellants.

Sir Rufus Isaacs, A.-G., and *Sir John Simon, S.-G.* (with them *Austen-Cartmell*), for the respondent.

During the opening of the respondent's case the appeal was adjourned in order to give the parties an opportunity of coming to an agreement.

Nov. 20. *Austen-Cartmell* (*Sir John Simon, A.-G.*, with him), for the respondent, informed the House that the parties had come to terms and had agreed upon a new scheme, and, by consent, the House made an order discharging the orders of the Courts below and embodying the scheme in the terms stated below.

> *Ordered and adjudged that the orders of the Court of Appeal and of Swinfen Eady J. be discharged: and further ordered that (by agreement between the parties) the following be the scheme for the administration and management of the charitable foundation consisting of certain lands and*

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hereditaments situate in the parish of Eglwysilan in the county of Glamorgan comprised in a deed poll dated December 31, 1867, *and under the hands and seals of the Right Hon. Harriett, Baroness Windsor, and the Right Hon. Robert Charles Herbert and Orlando George Charles, Earl of Bradford :—*

1. *This scheme shall operate and take effect during such period only as the land and hereditaments comprised in the deed poll of December* 31, 1867, *and the school house and buildings thereon (all which hereditaments and property are hereinafter called the school site and buildings) shall not be used for the purposes of an elementary school and also shall operate and take effect by way only of addition or supplement to the trusts and provisions of the said deed poll and not by way of general revocation of or substitution for such trusts and provisions and accordingly all such trusts and provisions shall remain and be of full force and unaffected except so far as the same are expressly or impliedly added to or supplemented hereby during the period aforesaid (hereinafter called the operative period).*
2. *During the operative period the school site and buildings shall (in addition to the use thereof on Sundays for the purposes of a Sunday school under the provisions of the said deed poll) be used on weekdays as follows that is to say—first and primarily and in priority to all other uses the school site and buildings shall be used on weekdays for such educational purposes in connection with the principles of the Established Church (hereinafter called Church educational purposes) as may be reasonably determined by the minister and churchwardens of the chapelry district of Caerphilly in the county of Glamorgan for the time being (hereinafter called "the*

trustees") having regard to the provisions and trusts of the said deed poll. And secondarily and subject always and without prejudice to the aforesaid primary and overriding user the school site and buildings are to be used on weekdays for such educational purposes other than those hereinbefore specified and by such person or persons body or bodies as the trustees shall from time to time determine.

3. *If the school site and buildings or any part thereof shall be used for any educational purpose not being among Church educational purposes as hereinbefore defined a proper payment shall be made by the person or persons body or bodies using the same for all wear and tear caused by or arising out of such user and for a due proportion of the expenses of insurance and repair and of the general maintenance and upkeep of the school site and buildings and any difference as to the amount of such payment shall be determined under the Arbitration Act,* 1889, *by a single arbitrator but no rent shall be chargeable against such person or persons or body or bodies.*

4. *Subject and without prejudice to the user of the school site and buildings for the purposes mentioned in clause* 2 *hereof the trustees may from time to time if and when the school site and buildings are not being used for any of the aforesaid purposes let the same for such temporary or casual purposes and to such person or persons body or bodies upon such terms as to rent or otherwise as they shall from time to time think fit.*

5. *Any payment received by the trustees in respect of any such user or in respect of any such letting as aforesaid shall be applied by the trustees in making good all wear and tear caused by or*

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arising out of such user or letting as the case may be and for the expenses of insurance and repair and of the general maintenance and upkeep of the school site and buildings and subject thereto any payment received by the trustees in respect of any such letting as aforesaid shall be applied by them in aid of the Church educational purposes aforesaid.

6. *Nothing in this scheme contained or to be done hereunder shall in any way prejudice or affect any right or powers of the trustees under the said deed poll or statute or otherwise to make any arrangement as to the re-opening and subsequent user of the school site and buildings as an elementary school upon any terms otherwise available for them.*

Lords' Journals, November 20, 1913.

Solicitors for appellants: *Crawley, Arnold & Co.*
Solicitor for respondent: *Treasury Solicitor.*

[HOUSE OF LORDS.]

G. AND C. KREGLINGER . . . . . APPELLANTS; H. L. (E.)* 1913 Nov. 20.

AND

NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LIMITED . . . . RESPONDENTS.

Mortgage—Clog on Equity of Redemption—Collateral Advantage—Whether enforceable after Redemption.

There is now no rule in equity that a mortgagee cannot stipulate in the mortgage deed for a collateral advantage to endure beyond redemption, provided that such collateral advantage is not either (1.) unfair and unconscionable, or (2.) in the nature of a penalty clogging the equity of redemption, or (3.) inconsistent with or repugnant to the contractual or equitable right to redeem.

The dicta of Lord Lindley on this point in *Bradley* v. *Carritt* [1903] A. C. 253, preferred to the dicta of Lord Macnaghten and Lord Davey.

Per Viscount Haldane L.C.: *Semble* the equitable doctrine against clogging applies to a floating charge as much as to any other mortgage security.

By an agreement dated August 24, 1910, a firm of woolbrokers agreed to lend to a company carrying on the business of meat preservers a sum of 10,000*l.* at 6 per cent. If the interest was punctually paid the loan was not to be called in until September 30, 1915, but the company might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheepskins sold by the company to any other person. The loan having been paid off by the company in January, 1913, in accordance with the agreement, the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan:—

Held, that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan; that it was not a clog on the equity of redemption or repugnant to the right to redeem;

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and that the lenders were entitled to an injunction restraining the company from selling sheepskins to any person other than the lenders in breach of the agreement.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an order of Swinfen Eady J.

The appellants were a firm of woolbrokers carrying on business in Antwerp and London. The respondents had their registered office in London and carried on the business of preserving meat.

By an agreement in writing dated August 24, 1910, and made between the respondents (thereinafter called the company) of the one part and the appellants (thereinafter called the lenders) of the other part, after reciting that the company had applied to the lenders for an advance of 10,000*l.* which the lenders had agreed to make on the terms thereinafter expressed, the lenders agreed immediately after the execution thereof to advance the company the sum of 10,000*l.* and the company agreed to repay the said sum on demand. Until repayment interest at 6 per cent. was to be paid half-yearly, and if punctually paid and if none of the events specified in clause 6 of the agreement happened and if the company duly observed all its obligations thereunder the lenders agreed not to demand repayment before September 30, 1915, but the company was to be at liberty to pay off the loan at any time on giving one calendar month's notice (clauses 1, 2, 3, and 4).

The agreement further provided as follows :—

Clause 5. "The company hereby charges its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital for the time being with the payment of the said principal sum and interest in accordance with the provisions hereinbefore contained to the intent that such charge shall be a floating security on the said undertaking and property subject only to such of the existing twenty thousand pounds debentures of the company as shall for the time being be outstanding but so that the company is not to be at liberty to create any mortgage or charge in priority to this security without the lenders' consent in writing or to sell its farms or lands or any portion thereof without the consent of the lenders."

Clause 6 provided that the principal moneys should immediately become payable in certain events (none of which happened), and clause 7 empowered the lenders at any time after the principal moneys thereby secured became payable to appoint a receiver of the undertaking and property of the company thereby charged.

Clause 8. "During a period of five years from the date hereof the following provisions shall apply:—

"(A) The company shall not sell any sheepskins to any person firm or company other than the lenders so long as the lenders are willing to purchase the same at a price equal to the best price (c.i.f. London) offered for the same by any such other person firm or company.

"(B) The company may by notice in writing at any time require the lenders to signify their willingness or unwillingness as the case may be to purchase any particular lot of sheepskins at the price aforesaid and the lenders shall in that case within five days after the receipt of the notice signify to the company their willingness or unwillingness as the case may be to purchase the sheepskins referred to in the notice and if within five days after the giving of the notice the lenders shall not have signified their willingness to purchase they shall be deemed to be unwilling to purchase the same."

[The sub-clause then contained a provision as to what should be deemed to be a sufficient receipt of notice.]

"(C) The company will pay to the lenders a commission of one per cent. upon the sale price of all sheepskins sold by the company to any person firm or company other than the lenders Provided always that no such commission shall be payable on any price less than the best price mentioned in sub-clauses (A) and (D) of this clause.

"(D) In the event of the lenders desiring to purchase any sheepskins wet then they shall be entitled to the benefit of sub-clause (A) of this clause if they are willing to purchase the same at a price equal to the best price offered for dry sheepskins (c.i.f. London) after making all proper deductions in respect of labour in drying baling shipping freight etc."

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Clause 11. "These presents shall have effect and be construed in all respects in accordance with English law."

In December, 1912, the respondents gave notice to the appellants to repay the loan, and on January 11, 1913, they duly paid the appellants all principal moneys and interest due under the agreement.

The appellants claimed to exercise their option to purchase sheepskins conferred by clause 8 notwithstanding the repayment of the loan, but this claim was disputed by the respondents on the grounds (1.) that upon the true construction of the agreement the operation of clause 8 was limited to the currency of the loan and (2.) that the option was void in equity as amounting to a clog on the redemption.

Thereupon the appellants commenced an action against the respondents for an injunction to restrain them during a period of five years from August 24, 1910, from selling any sheepskins to any person, firm, or company other than the appellants so long as the appellants were willing to purchase the same at a price equal to the best price (c.i.f. London) offered for the same by any such other person, firm, or company in breach of the agreement or from committing any other breach of the agreement, and for damages, and moved for an interlocutory injunction in the terms of the writ. In support of the motion an affidavit was filed by a member of the appellants' firm stating the objects of the appellants in entering into the agreement, but at the hearing of the motion it was agreed by counsel that no reliance should be placed on that statement and that the parties should rely on their legal rights under the agreement.

Swinfen Eady J. was of opinion that the decision of the Court of Appeal in *British South Africa Co.* v. *De Beers Consolidated Mines* (1) upon the point whether the equitable doctrine against clogging the equity of redemption extended to a floating charge was not reversed by the decision in the House of Lords. (2) He therefore held that he was bound by the judgment of the Court of Appeal and refused the motion.

The Court of Appeal (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.) affirmed the order of the learned judge.

(1) [1910] 2 Ch. 502. (2) [1912] A. C. 52.

1913. Oct. 17, 20, and 21. *The Hon. Frank Russell, K.C.*, and *J. F. W. Galbraith*, for the appellants. 1. The equitable doctrine against clogging the equity of redemption does not apply to debentures creating a floating charge on the property and undertaking of a company. In *De Beers Consolidated Mines* v. *British South Africa Co.* (1) this House reversed the decisions of the Courts below on the ground that upon the true construction of the agreement in question in that case the stipulation for a licence which was there impeached formed no part of the mortgage transaction and was therefore not a clog on the equity of redemption; but each of their Lordships protested against the extension of this doctrine to cases to which it had not been previously applied and inclined to the view that it did not extend to a floating charge. Hitherto the doctrine has never been applied except to a legal mortgage of specific property, and, having regard to the observations in the case above cited, it is submitted that the doctrine ought not now to be extended for the first time to a floating charge. A floating charge on the undertaking of a company differs in several respects from a legal mortgage of specific property. In the latter case the legal ownership passes to the mortgagee and the intention of the parties is that on repayment the mortgagor shall get back the specific thing that he has mortgaged. In the case of a floating charge, until the charge crystallizes, the company is left in absolute dominion of the property and can carry on its business in the ordinary course, and on repayment it never gets back the property in the state in which it originally was: *In re Panama, New Zealand, and Australian Royal Mail Co.* (2); *In re Florence Land and Public Works Co.* (3); *In re Hamilton's Windsor Iron Works* (4); Palmer's Company Precedents, 11th ed., vol. iii., p. 81. Unless expressly restricted the company may create a specific charge in priority to the floating charge or may transfer substantially its whole undertaking to another company, and the object of the restriction which appears in the present case is to meet the difficulty which occurred in *In re H. H. Vivian & Co.* (5)

(1) [1912] A. C. 52.
(2) (1870) L. R. 5 Ch. 318.
(3) (1878) 10 Ch. D. 530.
(4) (1879) 12 Ch. D. 707.
(5) [1900] 2 Ch. 654.

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and *In re Borax Co.* (1) The doctrine was originally designed to prevent the conversion of a mortgage into a purchase and to guard against the oppression of necessitous landowners by mortgagees—*Bowen* v. *Edwards* (2); *Willett* v. *Winnell* (3); *Jennings* v. *Ward* (4); *Vernon* v. *Bethell* (5)—and it was founded upon the principle that equity will relieve against a penalty or forfeiture. It has since been extended to the case of a return of the mortgaged property with a fetter attached to it, and the two most extreme instances of the application of the doctrine are *Noakes & Co.* v. *Rice* (6) and *Bradley* v. *Carritt.* (7) But in each of those cases there was a mortgage of specific property. The application of the doctrine to the commercial transactions of a great trading corporation is very far removed from the original foundation of the doctrine, namely, the protection of the needy landowner from imposition and oppression. It is an artificial doctrine for which at the present time no reason exists, for equity will relieve against oppression on the unconscionable bargain theory, and, inasmuch as it is opposed to the great principle of freedom of contract, this House will hesitate to apply the doctrine for the first time to a case which is not within the mischief it was intended to prevent, with the result of defeating a fair and honest transaction: *Albion Steel and Wire Co.* v. *Martin* (8), per Jessel M.R. It has no application at all to commercial instruments: *Manchester Trust* v. *Furness* (9), per Lindley L.J.

2. This stipulation for an option is not a clog affecting the property, but is a right in personam which survives after the payment off of the mortgage. It formed no part of the mortgage security, but was a condition precedent to the lending of the money. It is not shewn that any of the property over which the appellants are claiming to have an option was in fact subject to the charge contained in the agreement. In *Bradley* v. *Carritt* (7) (where Lord Shand and Lord

(1) [1901] 1 Ch. 326.
(2) (1661) 1 Rep. Ch. 221.
(3) (1687) 1 Vern. 488.
(4) (1705) 2 Vern. 520.
(5) (1762) 2 Eden, 110.
(6) [1902] A. C. 24.
(7) [1903] A. C. 253.
(8) (1875) 1 Ch. D. 580, at p. 584.
(9) [1895] 2 Q. B. 539, at p. 545.

Lindley differed from the majority), as in *Noakes & Co.* v. *Rice* (1), the decision of the House was that the stipulation did in fact prevent the return of the property in the condition in which it was when the mortgagor parted with it. There is no case which prevents a mortgagee from stipulating in the mortgage for a collateral advantage provided it is not oppressive and is not repugnant to the nature of the security, and *Biggs* v. *Hoddinott* (2), approved by this House in *Noakes & Co.* v. *Rice* (1), is an authority in favour of that right.

[LORD ATKINSON. In *Biggs* v. *Hoddinott* (2) the collateral advantage lasted only during the continuance of the security.]

The Court of Appeal did not rely on that circumstance but laid down a general principle.

3. Upon the construction of the agreement the contention of the respondents that the option was limited to the duration of the security is untenable. It was for a fixed period of five years not corresponding to the period within which the lenders were prohibited from calling in the money, and it might have expired during the currency of the mortgage.

Micklem, K.C., and *Arthur Ellis*, for the respondents. As regards the main argument of the appellants, namely, that this is a commercial transaction to which the doctrine against clogging does not apply, this is not a case of a company issuing a series of debentures, but of an ordinary equitable charge, and it is only a debenture in the sense in which every mortgage by a company may be called a debenture. It is analogous to what may be described as a floating charge on the property of an individual such as occurred in *Tailby* v. *Official Receiver*. (3) The facts of this case differ entirely from the facts of the *De Beers Case* (4), and the dicta of the learned Lords in that case have therefore no application.

[VISCOUNT HALDANE L.C. Speaking for myself I do not see why the doctrine should not apply to a floating charge just as much as to any other mortgage security.]

Treating this as an ordinary mortgage transaction, upon the fair reading of the agreement, the respondents are entitled to say

(1) [1902] A. C. 24.
(2) [1898] 2 Ch. 307.
(3) (1888) 13 App. Cas. 523.
(4) [1912] A. C. 52.

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that on repayment of the loan every stipulation in the agreement came to an end. Two principles are laid down in the recent cases before this House—(1.) that the property shall be restored to the mortgagor unfettered; (2.) that stipulations in favour of a mortgagee in a mortgage necessarily come to an end on payment off. The respondents rely upon both principles. They say, first, that this option is a clog on the equity of redemption, inasmuch as the subject-matter of the mortgage was the respondents' business and upon payment off they are not free to deal with their business in the same way as they could before the mortgage. They could not, for example, grant another mortgage on the same terms. Secondly, they say that this is a collateral stipulation for the benefit of the mortgagee which is limited to the currency of the mortgage. *Browne* v. *Ryan* (1), which was approved by this House in *Noakes & Co.* v. *Rice* (2) and *Bradley* v. *Carritt* (3), shews that it is not necessary that the collateral contract should affect the land. In *Chambers* v. *Goldwin* (4) and *Jennings* v. *Ward* (5) it was laid down that a mortgagee could not stipulate for a collateral advantage.

[VISCOUNT HALDANE L.C. It is admitted that that is not the law to-day.]

See also *Field* v. *Hopkins*. (6) In *Noakes & Co.* v. *Rice* (2) and *Bradley* v. *Carritt* (3) the House took the view that it was immaterial whether the stipulation touched the property or not and, treating the bargain as a personal contract, held that it was bad. In *Fairclough* v. *Swan Brewery Co.* (7) Lord Macnaghten, delivering the judgment of the Judicial Committee of the Privy Council, says that "it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption." In *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (8) Lord Lindley expressly states that *Noakes & Co.* v. *Rice* (2) and *Bradley* v. *Carritt* (3) conclusively shew that,

(1) [1901] 2 I. R. 653.
(2) [1902] A. C. 24.
(3) [1903] A. C. 253.
(4) (1804) 9 Ves. 254, at p. 271.
(5) 2 Vern. 520.
(6) (1890) 44 Ch. D. 524.
(7) [1912] A. C. 565, at p. 570.
(8) [1904] A. C. 323, at p. 329.

whatever may have been the intention of the parties, a mortgagee who stipulates in a mortgage for an option cannot exercise that option after repayment of the loan. This case is completely covered by *Browne* v. *Ryan* (1), *Noakes & Co.* v. *Rice* (2), and *Bradley* v. *Carritt*. (3)

The Hon. Frank Russell, K.C., replied.

[Reference was also made to *Mainland* v. *Upjohn* (4); *Davies* v. *Chamberlain* (5); *Morgan* v. *Jeffreys* (6); *Santley* v. *Wilde*. (7)]

The House took time for consideration.

Nov. 20. VISCOUNT HALDANE L.C. My Lords, the appellants are a firm of merchants and woolbrokers. The respondents carry on the business of preserving and canning meat and of boiling down the carcases of sheep and other animals. In the course of this business they have at their disposal a large number of sheepskins. It appears that in the summer of 1910 the respondents were desirous of borrowing 10,000*l.*, and requested the appellants to advance that sum. The appellants, who were desirous of obtaining an option to purchase for a term of five years all the sheepskins at the respondents' disposal, agreed to lend the money in consideration of being given such an option. The negotiations which followed resulted in an agreement dated August 24, 1910. Under this agreement the appellants were to lend the respondents the sum of 10,000*l.* repayable on demand with interest at 6 per cent. If, however, among other conditions to be observed, the interest was duly paid, the appellants were not to demand repayment till September 30, 1915, but the respondents were to be at liberty to pay off the loan earlier. To secure the loan the respondents by the agreement charged their undertaking and all their property, both present and future, with the payment of the principal sum and interest to the intent that the charge should be a floating security on the undertaking and property, but so that the respondents should not create any mortgage or charge in priority without the appellants'

(1) [1901] 2 I. R. 653.
(2) [1902] A. C. 24.
(3) [1903] A. C. 253.
(4) (1889) 41 Ch. D. 126.
(5) (1909) 26 Times L. R. 138.
(6) [1910] 1 Ch. 620.
(7) [1899] 2 Ch. 474.

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consent, or without such consent sell their farms or lands. The principal sum was to be made payable in certain prescribed events. By clause 8 of the agreement the respondents were not for five years from the date of the agreement (i.e., till August 24, 1915) to sell sheepskins to any one excepting the appellants, so long as the latter were willing to buy at a price equal to the best price (c.i.f. London) offered by any one else, and the respondents were to pay to the appellants a commission of 1 per cent. on the sale price of all sheepskins sold by the respondents to any one else.

My Lords, the respondents have now, as they were entitled to do under the agreement, paid off the loan. They claim that such payment has put an end to the option of the appellants to buy the respondents' sheepskins. Under the terms of the agreement this option, as I have already stated, will, if it is valid, continue operative until August 24, 1915. What the respondents say is that the stipulation is one that restricts their freedom in conducting the undertaking or business which is the subject of the floating charge; that it was consequently of the nature of a clog on their right to redeem and invalid; and that, whether it clogged the right to redeem or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption. The appellants, on the other hand, say that the stipulation in question was one of a kind usual in business, and that it was in the nature not of a clog but of a collateral bargain outside the actual loan, which they only agreed to make in order to obtain the option itself. They further say that even if the option could be regarded as within the doctrine of equity which forbids the clogging of the right to redeem, that doctrine does not in a case such as this extend to a floating charge.

The controversy which has thus arisen was brought before Swinfen Eady J. on a motion for an interlocutory injunction to restrain the respondents from selling sheepskins to any one else than the appellants. The learned judge refused this motion on the ground that the point had been settled adversely to the appellants by decisions of your Lordships' House. The case was brought formally before the Court of Appeal, but was disposed of there without argument with a view to taking the point as speedily as possible before your Lordships for review.

My Lords, before I refer to the decisions of this House which the Courts below have considered to cover the case, I will state what I conceive to be the broad principles which must govern it.

The reason for which a Court of Equity will set aside the legal title of a mortgagee and compel him to reconvey the land on being paid principal, interest, and costs is a very old one. It appears to owe its origin to the influence of the Church in the Courts of the early Chancellors. As early as the Council of Lateran in 1179, we find, according to Matthew Paris (Historia Major, 1684 ed. at pp. 114—115), that famous assembly of ecclesiastics condemning usurers and laying down that when a creditor had been paid his debt he should restore his pledge. (1) It was therefore not surprising that the Court of Chancery should at an early date have begun to exercise jurisdiction in personam over mortgagees. This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple should revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been

(1) Chron. Maj. ed. Luard, 1874 (Rolls series) ii., 311: "Si quis ab aliquo, commodata pecunia, possessiones in pignus acceperit, si deductis expensis sortem suam receperit ex fructibus possessionis"—[the mortgagee is supposed to be in possession and pay himself out of the rents and profits]—"pignus restituat debitori."

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evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the Court was on the alert to discover want of conscience in the terms imposed by lenders. But whatever else may have been the intention of those judges who laid the foundations of the modern doctrines with which we are concerned in this appeal, they certainly do not appear to have contemplated that their principle should develop consequences which would go far beyond the necessities of the case with which they were dealing and interfere with transactions which were not really of the nature of a mortgage, and which were free from objection on moral grounds. Moreover, the principle on which the Court of Chancery interfered with contracts of the class under consideration was not a rigid one. The equity judges looked, not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Thus in *Howard* v. *Harris* (1) Lord Keeper North in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction on the right to redeem was void in equity. But he went on to intimate that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognized in later authorities.

The principle was thus in early days limited in its application to the accomplishment of the end which was held to justify

(1) (1681) 1 Vern. 33; 2 Ch. Cas. 147.

interference of equity with freedom of contract. It did not go further. As established it was expressed in three ways. The most general of these was that if the transaction was once found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage. That the substance of the transaction must be looked to in applying this doctrine and that it did not apply to cases which were only apparently or technically within it but were in reality something more than cases of mortgage, *Howard* v. *Harris* (1) and other authorities shew. It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest. The Legislature during a long period placed restrictions on the rate of interest which could legally be exacted. But equity went beyond the limits of the statutes which limited the interest, and was ready to interfere with any usurious stipulation in a mortgage. In so doing it was influenced by the public policy of the time. That policy has now changed, and the Acts which limited the rate of interest have been repealed. The result is that a collateral advantage may now be stipulated for by the mortgagee provided that he has not acted unfairly or oppressively, and provided that the bargain does not conflict with the third form of the principle. This is that a mortgage (subject to the apparent exception in the case of family arrangements to which I have already alluded) cannot be made irredeemable, and that any stipulation which restricts or clogs the equity of redemption is void. It is obvious that the reason for the doctrine in this form is the same as that which gave rise to the other forms. It is simply an assertion in a different way of the principle that once a mortgage always a mortgage and nothing else.

My Lords, the rules I have stated have now been applied by Courts of Equity for nearly three centuries, and the books are full of illustrations of their application. But what I have pointed out shews that it is inconsistent with the objects for which they were established that these rules should crystallize into technical

(1) 1 Vern. 33; 2 Ch. Cas. 147.

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language so rigid that the letter can defeat the underlying spirit and purpose. Their application must correspond with the practical necessities of the time. The rule as to collateral advantages, for example, has been much modified by the repeal of the usury laws and by the recognition of modern varieties of commercial bargaining. In *Biggs* v. *Hoddinott* (1) it was held that a brewer might stipulate in a mortgage made to him of an hotel that during the five years for which the loan was to continue the mortgagors would deal with him exclusively for malt liquor. In the seventeenth and eighteenth centuries a Court of Equity could hardly have so decided, and the judgment illustrates the elastic character of equity jurisdiction and the power of equity judges to mould the rules which they apply in accordance with the exigencies of the time. The decision proceeded on the ground that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided, first, that no unfairness is shewn, and, secondly, that the right to redeem is not thereby clogged. It is no longer true that, as was said in *Jennings* v. *Ward* (2), "a man shall not have interest for his money and a collateral advantage besides for the loan of it." Unless such a bargain is unconscionable it is now good. But none the less the other and wider principle remains unshaken, that it is the essence of a mortgage that in the eye of a Court of Equity it should be a mere security for money, and that no bargain can be validly made which will prevent the mortgagor from redeeming on payment of what is due, including principal, interest, and costs. He may stipulate that he will not pay off his debt, and so redeem the mortgage, for a fixed period. But whenever a right to redeem arises out of the doctrine of equity, he is precluded from fettering it. This principle has become an integral part of our system of jurisprudence and must be faithfully adhered to.

My Lords, the question in the present case is whether the right to redeem has been interfered with. And this must, for the reasons to which I have adverted in considering the history of the doctrine of equity, depend on the answer to a question which is primarily one of fact. What was the true character of

(1) [1898] 2 Ch. 307. (2) 2 Vern. 520.

the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option of purchase of the sheepskins of the respondents? The question is in my opinion not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts. Putting aside for the moment considerations turning on the character of the floating charge, such an option no doubt affects the freedom of the respondents in carrying on their business even after the mortgage has been paid off. But so might other arrangements which would be plainly collateral, an agreement, for example, to take permanently into the firm a new partner as a condition of obtaining fresh capital in the form of a loan. The question is one not of form but of substance, and it can be answered in each case only by looking at all the circumstances, and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from judges in other and different cases. Some, at least, of the authorities on the subject disclose an embarrassment which has, in my opinion, arisen from neglect to bear this in mind. In applying a principle the ambit and validity of which depend on confining it steadily to the end for which it was established, the analogies of previous instances where it has been applied are apt to be misleading. For each case forms a real precedent only in so far as it affirms a principle, the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances.

My Lords, if in the case before the House your Lordships arrive at the conclusion that the agreement for an option to purchase the respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases cease to present any great difficulty. In questions of this kind the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle.

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To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance. I desire to associate myself with what was said on this subject by Sir George Jessel in the case of *In re Hallett's Estate* (1), and I will add that the view of the true limits of the use of authority, which I agree with him in holding, is of especial importance where, as here, the principle to be applied arises in the elastic jurisdiction of a Court of Equity, and has been established simply as an instrument to give effect to well defined and governing purpose.

My Lords, it is not in my opinion necessary for your Lordships to form an opinion as to whether you would have given the same decisions as were recently given by this House in certain cases which were cited to us. These cases, which related to circumstances differing widely from those before us, have been disposed of finally, and we are not concerned with them excepting in so far as they may have thrown fresh light on questions of principle. What is vital in the appeal now under consideration is to classify accurately the transaction between the parties. What we have to do is to ascertain from scrutiny of the circumstances whether there has really been an attempt to effect a mortgage with a provision preventing redemption of what was pledged merely as security for payment of the amount of the debt and any charges besides that may legitimately be

(1) (1879) 13 Ch. D. 696.

added. It is not, in my opinion, conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem on which equity insists as regards all contracts of loan and security ought on principle to be set aside as readily in the case of a floating security as in any other case. But it is material that such a floating charge, in the absence of bargain to the contrary effect, permits the assets to be dealt with freely by the mortgagor until the charge becomes enforceable. If it be said that the undertaking of the respondents which was charged extended to their entire business, including the right to dispose of the skins of which they might from time to time become possessed, the comment is that at least they were to be free, so long as the security remained a floating one, to make contracts in the ordinary course of business in regard to these skins. If there had been no mortgage such a contract as the one in question would have been an ordinary incident in such a business. We are considering the simple question of what is the effect on the right to redeem of having inserted into the formal instrument signed when the money was borrowed an ordinary commercial contract for the sale of skins extending over a period. It appears that it was the intention of the parties that the grant of the security should not affect the power to enter into such a contract, either with strangers or with the appellants, and if so I am unable to see how the equity of redemption is affected. No doubt it is the fact that on redemption the respondents will not get back their business as free from obligation as it was before the date of the security. But that may well be because outside the security and consistently with its terms there was a contemporaneous but collateral contract, contained in the same document as constituted the security, but in substance independent of it. If it was the intention of the parties, as I think it was, to enter into this contract as a condition of the respondents getting their advance, I know no reason either in morals or in equity which ought to prevent this intention from being left to have its effect. What was to be capable of redemption was an undertaking which was deliberately left to be freely changed in its details by ordinary

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business transactions with which the mortgage was not to interfere. Had the charge not been a floating one it might have been more difficult to give effect to this intention. In *Noakes & Co.* v. *Rice* (1) this difficulty is illustrated, for the House held that what had been inserted in the shape of a covenant by the mortgagor to buy the beer of the mortgagee after redemption of the public-house mortgaged was really a term of the mortgage and was inoperative as being, not merely a collateral agreement, but in truth a restriction on the right to get back the security free from the terms of the mortgage. That was the case of the mortgage of a specific property. The decision that the transaction was what it was held to be is at all events readily intelligible. In *Bradley* v. *Carritt* (2) it was decided that the mortgagor of shares in a tea company who had covenanted that he would use his best endeavours to secure that always thereafter the mortgagee should have the sale of the company's tea had permanently fettered himself in the free disposition and enjoyment of the shares. It was held that though the covenant did not operate in rem on the shares it amounted to a device or contrivance designed to impede redemption. The decision was a striking one. It was not unanimous, for Lord Lindley dissented from the conclusions of Lord Macnaghten and Lord Davey. It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the judgments of those of your Lordships' House who were in a majority must be taken as of binding authority. And it certainly cannot, in my opinion, be taken as authoritatively laying down that the mere circumstance that after redemption the property redeemed may not, as the result of some bargain made at the time of the mortgage, be in the same condition as it was before that time, is conclusive against the validity of that bargain. To render it invalid the bargain must, when its substance is examined, turn out to have formed part of the terms of the mortgage and to have really cut down a true right of redemption. I think that the tendency of recent decisions has been to lay undue stress on the letter of the principle which limits the jurisdiction of equity in setting aside contracts. The origin and reason of the principle

(1) [1902] A. C. 24. (2) [1903] A. C. 253.

ought, as I have already said, to be kept steadily in view in applying it to fresh cases. There appears to me to have grown up a tendency to look to the letter rather than to the spirit of the doctrine. The true view is, I think, that judges ought in this kind of jurisdiction to proceed cautiously, and to bear in mind the real reasons which have led Courts of Equity to insist on the free right to redeem and the limits within which the purpose of the rule ought to confine its scope. I cannot but think that the validity of the bargain in such cases as *Bradley* v. *Carritt* (1) and *Santley* v. *Wilde* (2) might have been made free from serious question if the parties had chosen to seek what would have been substantially the same result in a different form. For form may be very important when the question is one of the construction of ambiguous words in which people have expressed their intentions. I will add that, if I am right in the view which I take of the authorities, there is no reason for thinking that they establish another rule suggested by the learned counsel for the respondents, that even a mere collateral advantage stipulated for in the same instrument as constitutes the mortgage cannot endure after redemption. The dicta on which he relied are really illustrations of the other principles to which I have referred.

There is a further remark which I wish to make about *Bradley* v. *Carritt*. (1) It is impossible to read the report without seeing that there was a marked divergence of opinion among those members of your Lordships' House who took part in the decision as to the test by which the validity of contracts collateral to a mortgage is to be determined. Lord Davey observes that he cannot understand how, consistently with the doctrine of equity, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the mortgaged property after redemption. Lord Lindley, on the other hand, doubts whether the covenant in question, a covenant that the mortgagor would use his influence as a shareholder to secure for the mortgagee in permanence the brokerage business of the company, ought to be looked on as really forming part of the terms of the security. He points out that when the usury

(1) [1903] A. C. 253. (2) [1899] 2 Ch. 474.

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laws were in force, and when every device for evading them had to be defeated by equity, the proposition that everything that was part of the mortgage transaction must cease with it, if it was not to infringe the doctrine that once a mortgage always a mortgage, was a convenient statement and as free from objection as most concise statements are, but that when the usury laws were abolished the language was too wide to be accurate.

My Lords, the views expressed by Lord Davey and Lord Lindley are not, so far as mere words go, contradictory. But I cannot shut my eyes to the fact that they represent divergent tendencies. Lord Davey seems to suggest that the doctrine about which, when expressed in general terms, there is little controversy had become finally crystallized in the particular expressions used in certain of the earlier authorities, and that, having become thus rigid, it is to-day fatal to the freedom of mortgagor and mortgagee to make their own bargains, even in cases where the reason for applying the doctrine has ceased to exist. The tendency of Lord Lindley's language is, on the other hand, to treat the application of such a rule as a question in which the Courts must not lose sight of the dominating principle underlying the reasons which originally influenced the terms of the rule, reasons which have, in certain cases, become modified as public policy has changed. Speaking for myself, and notwithstanding the high authority of Lord Davey, I think that the tendency of Lord Lindley's conclusion is the one which is most consonant with principle, and I see no valid reason why this House should not act in accordance with it in the case now under consideration.

The decision of this House in *De Beers Consolidated Mines* v. *British South Africa Co.* (1) does not assist us much, because it really turned on the facts. It was held that the stipulation for the licence in question was not part of the mortgage transaction, and this disposed of the appeal. The question was, however, raised, whether the general principles of equity in regard to the right to redeem apply in their integrity to mortgages by way of floating charge. I have already expressed all that it seems to me necessary to say on the point.

(1) [1912] A. C. 52.

The result of the consideration I have given to this appeal is that I think that the contention of the appellants is right. That they should succeed on a point which was little if at all considered in the Courts below is presumably due to the question raised having been thought to be covered by authority. That does not affect the appellants' right to argue the real point here. The parties have apparently agreed that the result of the motion should be considered as disposing of the action, and that if on the point which has been argued the decision is for the appellants they should be declared to be entitled to the injunction asked for. I think that the simplest way of giving effect to this agreement on the footing that the appeal is to be decided in the appellants' favour will be to declare them entitled to an injunction in terms of the notice of motion and to the costs here and in the Court of Appeal, with liberty to apply to the Chancery Division to dispose of the action. I move accordingly.

Earl of Halsbury. My Lords, I entirely concur with what the noble and learned Lord on the woolsack has suggested as the proper judgment in this case. I have also had an opportunity of reading the extremely illuminating judgment of my noble and learned friend Lord Parker, and I say sincerely, having read those two judgments, that I feel absolutely unable to add anything to them.

Lord Atkinson. My Lords, I concur. I, too, have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend on the woolsack, and also that which is about to be delivered by my noble and learned friend Lord Parker, and I feel that I cannot possibly, with any advantage, add anything to either. I concur in both.

Lord Mersey. My Lords, I agree, and I desire to add only a few words. The transaction out of which this dispute arises is sufficiently described in the judgment of the Lord Chancellor. Though embodied in one document it is an agreement made up of two parts. The first part consists of a promise by the appellants, who are merchants, to lend to the respondents, who are a trading company, money at interest on the security of a floating

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charge over the company's undertaking; the second part consists of an agreement by the company to give to the lenders the option of purchasing for a time their periodical production of sheepskins. The whole transaction is of a most ordinary commercial kind.

It is contended that the contract is a mortgage to which the equitable doctrine prohibiting the imposition of a clog on a mortgagor's right to redeem applies, and that, therefore, on payment off of the loan the borrowers are entitled to have back their undertaking freed from any further obligation to sell or deliver sheepskins. Now, whether a transaction is or is not such a mortgage is a question of intention; and it seems that it has always been the practice of the Courts of Chancery to admit oral evidence to assist in solving the question. No evidence is adduced on this point on the part of the respondents, so that your Lordships are left by them to determine the intention merely from the words which the parties have used in drawing up their agreement. These words are, in my opinion, too plain and simple to leave any doubt as to their meaning. The obligation to sell sheepskins created by clause 8 of the agreement was to endure in any event until August, 1915. That was the plain intention of both parties to the agreement, and the only effect of applying to the contract the equitable doctrine against clogging the right to redeem would be to defeat that intention and to enable one of the parties to inflict an injustice on the other.

I have nothing to say about the doctrine itself. It seems to me to be like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be. Its introduction into the present case would give effect to no equity and would defeat justice.

Lord Parker of Waddington. My Lords, the defendants in this case are appealing to the equitable jurisdiction of the Court for relief from a contract which they admit to be fair and reasonable and of which they have already enjoyed the full advantage. Their title to relief is based on some equity which they say is inherent in all transactions in the nature of a mortgage. They can state no intelligible principle underlying this alleged equity,

but contend that your Lordships are bound by authority. That the Court should be asked in the exercise of its equitable jurisdiction to assist in so inequitable a proceeding as the repudiation of a fair and reasonable bargain is somewhat startling, and makes it necessary to examine the point of view from which Courts of Equity have always regarded mortgage transactions. For this purpose I have referred to most, if not all, of the reported cases on the subject, and propose to state shortly the conclusions at which I have arrived.

My Lords, a legal mortgage has generally taken the form of a conveyance with a proviso for reconveyance on the payment of money by a specified date. But a conveyance in this form is by no means necessarily a mortgage. In order to determine whether it is or is not a mortgage, equity has always looked to the real intention of the parties, to be gathered not only from the terms of the particular instrument but from all the circumstances of the transaction, and has always admitted parol evidence in cases where the real intention was in doubt. Only if according to the real intention of the parties the property was to be held as a pledge or security for the payment of the money, and as such to be restored to the mortgagor when the money was paid, was the conveyance considered to be a mortgage. Further, the mortgage might be given to secure not only a single money payment but a series of money payments extending over many years, and again the money secured might or might not, according to the circumstances, constitute a debt due from mortgagor to mortgagee. There might also be mortgages by way of security for something other than a money payment or series of money payments, for example, mortgages by way of indemnity, but these may be disregarded for the purposes of this case.

Taking the simple case of a mortgage by way of conveyance with a proviso for reconveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would specifically perform the contract for reconveyance. On the other hand, the mortgagor might fail to pay the money on the date specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity,

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however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem there arose an equity to redeem, notwithstanding the specified date had passed. Till this date had passed there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable. The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which, from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption.

Now if, as was not infrequently the case, such a legal mortgage as above described contained a further stipulation that if default were made in payment of the money secured on the date specified the mortgagor should not exercise his equitable right to redeem, or should only exercise it as to part of the mortgaged property, or on payment of some additional sum or performance of some additional condition, such stipulation was always regarded in equity as a penal clause against which relief would be given. This is the principle underlying the rule against fetters or clogs on the equity of redemption. The rule may be stated thus: The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction. This rule is equally applicable to all transactions of mortgage, whether the mortgagor is or is not under personal liability to pay the money secured, and whether or not the mortgage is given to secure a loan made at the time of the mortgage or some existing debt of the mortgagee. For example, it would be applicable to a mortgage with a proviso for reconveyance on the payment to the mortgagee by the mortgagor or a third party of moneys owing by such third party to the mortgagee.

By way of illustration of this rule I will ask your Lordships' attention to the case of *Salt* v. *Marquess of Northampton* (1), which came to your Lordships' House. In that case an insurance society had advanced 10,000*l.* to Lord Compton on the security of a reversionary interest to which he was entitled if he survived his father. Pursuant to the agreement made upon

(1) (1890) 45 Ch. D. 190; [1892] A. C. 1.

the occasion of the advance, the society insured Lord Compton's life against the life of his father, and paid the premiums on this policy up to the father's death. This agreement contained a provision that if Lord Compton during his father's life repaid to the society this 10,000*l.* and the amount of the premiums with interest, the policy should belong to Lord Compton, but if Lord Compton died in his father's lifetime without having repaid the 10,000*l.* and the premiums with interest, the policy should belong to the society. It was this latter event which happened, and the question arose whether the policy belonged to the society or whether it was redeemable on payment of what was due in respect of the moneys advanced and the premiums and interest. If the policy when taken out pursuant to the agreement was in equity the property of the mortgagor, it was part of the property which he had mortgaged to secure the advance, and there being a contractual right to redeem during his father's life, and an equitable right to redeem arising if the contractual right were not exercised, the clause providing that if the contractual right were not exercised the policy should belong to the society was in the nature of a penalty, against which equity would relieve. It was a clog on the equity in the proper sense of that expression. It having been held that the policy did in equity from the first belong to the mortgagor, it followed that the provision in question was void as a clog on the equity.

My Lords, there is another point which has some importance, namely, the terms upon which equity allowed redemption after the estate had become absolute at law. Except in the case of mortgages to secure moneys advanced by way of loan, to which I shall presently refer, equity only allowed redemption on the mortgagor giving effect so far as he could to the terms on which by the bargain between the parties he had a contractual right to redeem the property. Equity might, and most frequently did, impose further terms, e.g., payment of interest up to the date of redemption and proper mortgagees' costs. But except in the case of mortgages to secure moneys advanced by way of loan, I can find no trace in the authorities of any equitable right to redeem without giving effect as far as possible to the terms of the bargain. This is consistent with the principle underlying the rule as to

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clogging the equity. In relieving from penalties or forfeitures equity has always endeavoured to put the parties as far as possible into the position in which they would have been if no penalty or forfeiture had occurred. It is only in the case of mortgages to secure moneys advanced by way of loan that there was ever any equity to redeem on terms not involving performance of the bargain between the parties. The reason for this exception will appear presently.

There is another point of view from which a clog or fetter on the equitable right to redeem may be properly regarded. The nature of the equitable right is so well known that, upon a mortgage in the usual form to secure a money payment on a certain day, it must be taken to be a term of the real bargain between the parties that the property should remain redeemable in equity after failure to exercise the contractual right. Any fetter or clog imposed by the instrument of mortgage on this equitable right may be properly regarded as a repugnant condition and as such invalid. There are, however, repugnant conditions which cannot be regarded as mere penalties intended to deter the exercise of the equitable right which arises when the time for the exercise of the contractual right has gone by, but which are repugnant to the contractual right itself. A condition to the effect that if the contractual right is not exercised by the time specified the mortgagee shall have an option of purchasing the mortgaged property may properly be regarded as a penal clause. It is repugnant only to the equity and not to the contractual right. But a condition that the mortgagee is to have such an option for a period which begins before the time for the exercise of the equitable right has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the contractual right, is inconsistent not only with the equity but with the contractual right itself, and might, I think, be held invalid for repugnancy even in a Court of law.

This consideration affords a possible and reasonable explanation of the rule referred to in some of the authorities, to the effect that a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part of or interest in the mortgaged premises. Suppose the

following simple case, namely, a conveyance by way of mortgage with a proviso for reconveyance if the mortgagor pay to the mortgagee 500*l.* and interest at the end of six months, and then a further stipulation that the mortgagee should have an option of purchasing the property for another six months. If the mortgagor pays the moneys secured by the specified date the mortgagee comes under a contractual liability to reconvey, and if he does reconvey he reconveys his whole interest in the mortgaged property, thus destroying his option. The option, therefore, is inconsistent with and repugnant to the proviso for reconveyance, which embodies the terms of the contractual right to redeem. It may, therefore, be rejected. It is also inconsistent with and repugnant to the equity of redemption, which arises on failure to exercise the contractual right to redeem. It is, therefore, though not strictly a penalty, sometimes referred to as a clog on this equity. The fact that the inconsistency is most apparent in mortgages with an express proviso for redemption may account for Lord Hardwicke's inclination to confine the rule to such mortgages: *Mellor* v. *Lees.*(1) In *Newcomb* v. *Bonham*(2) the objection based on the rule is thus formulated: "Here is a power" (meaning the express proviso) "to redeem, and it shall never be extinct by any covenant at the same time," and the Court held that this was the usual rule. In the case of mortgages without such an express proviso there might, it is true, be a like inconsistency or repugnancy, but only if the real intention of the parties was that the property should be held as security for the moneys charged thereon and restored intact to the mortgagor as soon as these moneys were paid, but, as in the last-mentioned case, it is always possible that this was not the true intention, and unless it be the true intention the transaction is not really a mortgage under the rule, but something more complex. It should be noticed that Lord Henley's explanation of the rule in *Vernon* v. *Bethell*(3) is based on considerations applicable only to mortgages to secure loans though the rule itself is not confined to such last-mentioned mortgages. Indeed, in the case of mortgages to secure loans the mortgagee could not

(1) (1742) 2 Atk. 494. (2) (1681) 2 Ch. Cas. 58.
(3) 2 Eden, 110, at p. 113.

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in Lord Henley's time have contracted for an interest in or option over the mortgaged property for quite another reason.

All that I have said hitherto as to the equitable considerations affecting legal mortgages in the usual form applies equally to conveyances of equitable interests where there is an express proviso for redemption. The only difference in this case is that there is no legal estate to become absolute on failure to exercise the contractual right, though there is a contract for reconveyance for breach of which an action might lie at law. It applies also, but with some important qualifications, to mere equitable charges. In the case of a mortgagor merely charging a property with payment to the mortgagee of a sum of money not only does the mortgagee take no interest at law in the property charged, but there is no contract for reconveyance at all. The right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free, and if the day passes without payment there will still be an equity to have the property so freed notwithstanding any provision in the nature of a penalty, such penal provision being a clog on the equity. The difference between transactions by way of equitable charge and transactions by way of conveyance with a proviso for reconveyance is chiefly important when, for the purpose of determining whether a particular stipulation ought or ought not to be rejected for inconsistency or repugnancy, the nature of the transaction between the parties has to be investigated.

I have pointed out that in mortgages in common form an option to purchase is inconsistent with and repugnant to the proviso for reconveyance on payment of the money secured. But is there any such repugnancy or inconsistency in the following case? A. agrees to give B. an option for one year to purchase a property for 10,000*l*. In consideration of such option B. agrees to lend, and does lend, A. 1000*l*. to be charged on the property without interest, and be repayable at the expiration or earlier exercise of the option. I cannot myself see that there is any inconsistency or repugnancy between the provisions of this

perfectly simple and straightforward transaction. It would have been very different if A. had conveyed the property to B. with a proviso that on payment of the 1000*l.* there should be a reconveyance, and the deed had then provided for the year's option. Here the option would be inconsistent with, and would in fact have been destroyed by, the reconveyance.

My Lords, I desire, in connection with what I have just said, to add a few words on the maxims in which attempts have been made to sum up the equitable principles applicable to mortgage transactions. I refer to the maxims, "Once a mortgage, always a mortgage," or, "A mortgage cannot be made irredeemable." Such maxims, however convenient, afford little assistance where the Court has to deal with a new or doubtful case. They obviously beg the question, always of great importance, whether the particular transaction which the Court has to consider is, in fact, a mortgage or not, and if they be acted on without a careful consideration of the equitable considerations on which they are based, can only, like Bacon's idols of the market place, lead to misconception and error.

We will suppose that money is advanced to a company repayable at the expiration of fifteen years, not an unusual period, and that the company by way of security subdemises (as is often the case) to trustees for the lenders a number of leaseholds, some of which are held for terms less than fifteen years. It would, in my opinion, be a serious error to argue that this was an attempt to make an irredeemable mortgage. There would be the same error in objecting on the like ground to a mortgage of leaseholds to secure an annuity for a period exceeding the term of the lease. If the mortgage is irredeemable at all, this arises from the nature of the property mortgaged, and not from any penal or repugnant stipulation on the part of the mortgagee, and the maxim properly understood is in no way infringed. We will suppose again that a firm of manufacturers desires to take in a new partner, proposing to charge a premium of 3000*l.* A. wants to buy a partnership, but before entering this firm desires some further acquaintance with the extent and methods of its business. It is thereupon arranged that A. shall be taken on as a clerk for a year and have a year's option of entering the firm as a partner

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at a premium of 3000*l.*, and in the meantime shall advance the firm 3000*l.*, charged on some partnership property, to be set off against the premium if the option be exercised, but otherwise refunded at the end of the year. To suggest that such an arrangement was bad because it infringed the maxim of "once a mortgage, always a mortgage," would, in my opinion, be erroneous. If the option were exercised the transaction would not according to the true intention of the parties be a mortgage at all.

My Lords, I now come to the particular class of mortgages to which I have already referred, that is to say, mortgages to secure borrowed money. For the whole period during which the Court of Chancery was formulating and laying down its equitable doctrines in relation to mortgages there existed statutes strictly limiting the rate of interest which could be legally charged for borrowed money. If a mortgagee stipulated for some advantage beyond repayment of his principal with interest, equity considered that he was acting contrary to the spirit of these statutes, and held the stipulation bad on this ground. There thus arose the rule so often referred to in the reported decisions, that in a mortgage to secure borrowed money the mortgagee could not contract for any such advantage. There was said to be an equity to redeem on payment of principal, interest, and costs, whatever might have been the bargain between the parties, and any stipulation by the mortgagee for a further or, as it was sometimes called, a collateral advantage came to be spoken of as a clog or fetter on this equity. It is of the greatest importance to observe that this equity is not the equity to redeem with which I have hitherto been dealing. It is an equity which arises ab initio, and not only on failure to exercise the contractual right to redeem. It can be asserted before as well as after such failure. It has nothing to do with time not being of the essence of a contract, or with relief from penalties or with repugnant conditions. It is not a right to redeem on the contractual terms, but a right to redeem notwithstanding the contractual terms, a right which depended on the existence of the statutes against usury and the public policy thought to be involved in those statutes. Unfortunately, in some of the authorities this right is spoken of as a right incidental to mortgages generally, and not confined to

mortgages to secure borrowed money. This is quite explicable when it is remembered that a loan is perhaps the most frequent occasion for a mortgage. But it is, I think, none the less erroneous. I can find no instance of the rule which precludes a mortgagee from stipulating for a collateral advantage having been applied to a mortgage other than a mortgage to secure borrowed money, and there is the authority of Lord Eldon in *Chambers* v. *Goldwin* (1) for saying that this rule was based on the usury laws. The right (notwithstanding the terms of the bargain) to redeem on payment of principal, interest, and costs is a mere corollary to this rule, and falls with it. It is to be observed that stipulations for a collateral advantage may be classified under two heads—first, those the performance of which is made a term of the contractual right to redeem, and, secondly, those the performance of which is not made a term of such contractual right. In the former case in settling the terms on which redemption was allowed the Court of Chancery entirely ignored such stipulations. In the latter case, so far as redemption was concerned, the stipulations were immaterial, but it is said that in both cases the Court of Chancery would have restrained an action at law for damages for their breach. This is possible, though I can find no instance of its having been done, but clearly on a bill for an injunction to restrain an action at law the plaintiff would have to shew some equity entitling him to be relieved from his contract, and such equity could, I think, have been based only on the usury laws, or the public policy which gave rise to them.

The last of the usury laws was repealed in 1854, and thenceforward there was, in my opinion, no intelligible reason why mortgages to secure loans should be on any different footing from other mortgages. In particular, there was no reason why the old rule against a mortgagee being able to stipulate for a collateral advantage should be maintained in any form or with any modification. Borrowers of money were fully protected from oppression by the pains always taken by the Court of Chancery to see that the bargain between borrower and lender was not unconscionable. Unfortunately, at the time when the

(1) 9 Ves. 254, at p. 271.

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last of the usury laws was repealed, the origin of the rule appears to have been more or less forgotten, and the cases decided since such repeal exhibit an extraordinary diversity of judicial opinion on the subject. It is little wonder that, with the existence in the authorities of so many contradictory theories, persons desiring to repudiate a fair and reasonable bargain have attempted to obtain the assistance of the Court in that behalf. My Lords, to one who, like myself, has always admired the way in which the Court of Chancery succeeded in supplementing our common law system in accordance with the exigencies of a growing civilization, it is satisfactory to find, as I have found on analysing the cases in question, that no such attempt has yet been successful. In every case in which a stipulation by a mortgagee for a collateral advantage has, since the repeal of the usury laws, been held invalid, the stipulation has been open to objection, either (1.) because it was unconscionable, or (2.) because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem, or (3.) because it was in the nature of a condition repugnant as well to the contractual as to the equitable right. It is true that in the case of *Santley* v. *Wilde* (1) the attempt that was made to induce the Court in the exercise of its equitable jurisdiction to assist in repudiation of a fair and reasonable bargain ought, according to the opinion of other judges, to have been successful, but it is one thing to criticize a decision and quite another to take the responsibility of deciding a case.

My Lords, the present defendants rely chiefly on three cases which came up to your Lordships' House, and to which I must shortly refer. In the first of those cases, *Noakes & Co.* v. *Rice* (2), the collateral advantage in question was a covenant tying the mortgaged premises, which consisted of a leasehold public-house, to the mortgagees' brewery. There was a proviso for reconveyance of the public-house to the mortgagor upon payment on demand or without demand of all moneys thereby covenanted to be paid. There was, therefore, a contractual right to a reconveyance whenever the mortgagor thought fit to pay. The tie, however, was for the whole term of

(1) [1899] 2 Ch. 474. (2) [1902] A. C. 24.

the lease, and was clearly inconsistent with and repugnant to this right. It was therefore bad. There is, I think, nothing at variance with anything I have suggested to your Lordships either in the decision itself or in the speeches of any of the noble Lords who advised the House with the exception of the speech of Lord Davey.

It is with the greatest diffidence that I venture to criticize any opinion expressed by so great an authority, but I cannot wholly accept what Lord Davey lays down as to the equitable principle in relation to mortgages. It appears to me that he omits to notice that the doctrine as to clogs upon the equity of redemption is applicable to all mortgages, and not confined to mortgages to secure borrowed money, and, founding himself upon considerations which apply, if they apply at all, only to the latter class of mortgage, defines the equity to redeem in such a way that in many cases it could never fit the facts at all. I can best illustrate this by supposing that in the case he was considering the mortgage had been given by way of security for the debt of a third party, the mortgagee agreeing not to enforce the debt for a specified period. The tie would still have constituted a clog, being inconsistent with the proviso for redemption and consequently inconsistent with any equitable right to redeem, but a considerable part of Lord Davey's judgment would have been entirely inappropriate. Thus, after approving Lord Lindley's statement in *Santley* v. *Wilde* (1) to the effect that a clog is something inconsistent with the security, and in the nature of a repugnant condition, he proceeds as follows (2): "But I ask, 'security' for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration on the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end." Then,

(1) [1899] 2 Ch. 474. (2) [1902] A. C., at p. 34.

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after criticizing *Santley* v. *Wilde* (1), he continues: "In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest could be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be a clog or fetter on the equity of redemption." It is evident that no part of the above can possibly apply to mortgages other than those entered into upon the occasion of a transaction of loan. It appears to me that the noble Lord is reasserting in a modified form the doctrine which prevailed prior to the repeal of the usury laws, and was based on those laws. As long as it was impossible because of the usury laws for a mortgagee upon making a loan to stipulate for any collateral advantage, the equity was an equity to redeem on payment of principal of the loan with interest and costs, and any stipulation to the contrary might be considered a clog. A mortgagee may now stipulate for a collateral advantage, but Lord Davey assumes that the equity remains the same, and, if this be so, it follows that every collateral stipulation which cannot be considered in the nature of interest is still bad. In my opinion the equity cannot remain the same when the only reason for its existence is gone. Nor can I accept the proposition that upon the occasion of a loan the mortgagee cannot stipulate for any payment falling due after the principal is repaid. Such a rule would seriously interfere with business transactions and would be a hardship on mortgagees and mortgagors alike. Take, for instance, a case like *Potter* v. *Edwards* (2), where in consideration of 700*l.* a mortgagee agrees to pay 1000*l.* with interest on a fixed date, and the proviso for redemption is framed accordingly. This is good, but according to the proposition in question if the mortgagee had desired further time for the payment of the 300*l.* bonus and the proviso for reconveyance had been upon payment of the 700*l.* and interest on the fixed date, and the 300*l.* by instalments payable later, there would have been an illegal clog. I can see no objection to a bargain by

(1) [1899] 2 Ch. 474. (2) (1857) 26 L. J. (Ch.) 468.

which money is advanced for three years and the borrower pays by way of remuneration or interest for the use of money a further sum payable by instalments extending over five years. Why should there be any principle of law or equity precluding free contract in this respect?

My Lords, I come now to the second of the three cases to which I have referred, the case of *Bradley* v. *Carritt*. (1) Here there was a mortgage of shares in a company expressed to be by way of security for borrowed money payable on or before a fixed date, with interest in the meantime. This involved an obligation to retransfer the shares if the money and interest were paid as agreed. On default there would be an equity to a reconveyance on payment of principal, interest, and costs. There was a clause enabling the mortgagee on default to take over the shares in satisfaction of the debt. This being in the nature of a penalty was a clog on the equity to redeem, and therefore bad. There was also a provision that the mortgagee should always thereafter, as shareholder, use his best endeavours to secure that the mortgagee or his firm should have the sale of the company's teas and in the event of such teas being sold otherwise than through the mortgagee or his firm the mortgagor was to pay the mortgagee a commission. It was as to this latter clause that the difficulty arose. Was it or was it not operative after redemption? The real question, in my opinion, was whether it was inconsistent with or repugnant to the contractual right of the mortgagee to have his property restored unfettered if he paid the money secured with interest as provided in the agreement, and the consequent equitable right to have the property so restored if he paid this money with interest and costs at any time. On this point there was room for difference of opinion, and accordingly we find Bigham J., A. L. Smith M.R., Stirling L.J., Vaughan Williams L.J., Lord Lindley, and Lord Shand taking one view, and Lords Macnaghten, Davey, and Robertson taking another. There is really no difficulty in the decision itself. It is merely to the effect that the case was within the principles of *Noakes & Co.* v. *Rice*. (2) Lords Macnaghten, Davey, and Robertson all thought that if the stipulations in question were binding after

(1) [1901] 2 K. B. 550; [1903] A. C. 253. (2) [1902] A. C. 24.

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redemption the mortgagor would not upon redemption get back his property intact; in other words, that the stipulation was repugnant both to the contractual right and the equity. But both Lord Macnaghten and Lord Davey also expressed opinions to the effect that all stipulations for collateral advantages must come to an end upon redemption. These expressions of opinion were not, I think, necessary to the decision, and though, of course, of the greatest weight, are not, I think, binding on your Lordships, more especially as Lord Lindley dissented from them. I think that Lord Lindley's conclusions on the point are more in accordance both with principle and authority.

My Lords, the last case to which it is necessary to refer is *Samuel* v. *Jarrah Timber and Wood Paving Corporation.* (1) The facts of this case were simple. There was a loan, and certain debenture stock was, by the express terms of the agreement, to be transferred, and was, in fact, transferred, to the mortgagee "as security" for the loan. This meant that on repayment of the loan with interest the stock was to be retransferred. The loan was repayable upon thirty days' notice on either side and the mortgagee was to have an option to purchase the stock for twelve months. This option being inconsistent with both the contractual and equitable right of redemption was clearly invalid. To use Lord Macnaghten's language, it is an established rule that a mortgagee can never provide at the time of making the loan for any event in which the equity of redemption shall be discharged and the conveyance become absolute. As I have already said, I think the rule depends on the inconsistency or repugnancy involved in any such provision. If once you come to the conclusion that the parties intended that the property should be reconveyed on payment off of the moneys secured any provision which would prevent this must be rejected as inconsistent with and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties, then the transaction is not one of mortgage at all.

My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite

(1) [1903] 2 Ch. 1; [1904] A. C. 323.

your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1.) unfair and unconscionable, or (2.) in the nature of a penalty clogging the equity of redemption, or (3.) inconsistent with or repugnant to the contractual and equitable right to redeem.

In the present case it is clear from the evidence, if not from the agreement of August 24, 1910, itself, that the nature of the transaction was as follows: The defendant company wanted to borrow 10,000*l.*, and the plaintiffs desired to obtain an option of purchase over any sheepskins the defendants might have for sale during a period of five years. The plaintiffs agreed to lend the money in consideration of obtaining this option, and the defendant company agreed to give the option in consideration of obtaining the loan. The loan was to carry interest at 6 per cent. per annum, and was not to be called in by the plaintiffs for a specified period. The defendant company, however, might pay it off at any time. It was to be secured by a floating charge over the defendant company's undertaking. The option was to continue for five years, whether the loan was paid off or otherwise, and if the plaintiffs did not exercise their option as to any of the defendant company's skins, a commission on the sale of such skins was in certain events payable to the plaintiffs.

I doubt whether, even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. The only possible way of deciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intention of the parties. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty, nor was it nor could it ever become inconsistent with or repugnant to any other part of the real bargain within any such rule or maxim. The same is true of the commission payable on the sale of skins as to which the option was not exercised. Under

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these circumstances it seems to me that the bargain must stand and that the plaintiffs are entitled to the relief they claim.

Order of the Court of Appeal reversed, and declare that the appellants are entitled to an injunction in the terms of the notice of motion with liberty to apply to the Chancery Division to dispose of the action. The respondents to pay the costs in the Court of Appeal and of the appeal to this House.

Lords' Journals, November 20, 1913.

Solicitors for appellants: *Alfred Double & Sons.*
Solicitors for respondents: *Rawle, Johnstone & Co.*

[HOUSE OF LORDS.]

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PLUMB (PAUPER) . . . . . APPELLANT;

AND

COBDEN FLOUR MILLS COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of Employment—Dangerous Method of doing Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The appellant was employed with two others in a room in the respondents' mill to stack bundles of sacks. The bundles were always stacked by hand. After the men had raised the bundles as high as they could by hand the appellant resolved to utilize for this purpose a revolving shaft which ran along the room near the ceiling but was not used in connection with any machinery in that room. A rope was thrown over the shaft and one end was made fast to a bundle which was then hauled by means of the shaft to the top of the stack. The appellant, who was standing on the stack, while endeavouring to extricate a bundle which had been hauled too high and had stuck between the shaft and the ceiling, got his arm entangled in the rope and was carried round the shaft and injured:—

Held, that there was no evidence to support a finding by the county

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* *Present:* VISCOUNT HALDANE L.C LORD KINNEAR, LORD DUNEDIN, and LORD ATKINSON.

court judge that the accident arose out of the workman's employment within the Workmen's Compensation Act.

Watkins v. *Guest, Keen & Nettlefolds*, (1912) 5 B. W. C. C. 307, considered.

APPEAL from an order of the Court of Appeal reversing an award of the county court judge of Denbighshire, made under the Workmen's Compensation Act.

The following statement of facts is taken from the judgment of Lord Dunedin:—"The appellant was a foreman worker in the employment of the respondents, and his duties on the day on which he was injured consisted in stacking bundles of sacks in a room in the respondents' premises. The work was done by hand. In the room in which this was being done there ran along the ceiling a shaft which transmitted power to machines in other rooms, but there were no pulleys on the shaft in this room, and it was not used in connection with any machine in this room. The stack had arrived at the height of about seven feet and the bundles could no longer be thrown up from the bottom. The appellant, who was on the top of the stack, then improvised a method of getting up the sacks. He put a rope round the revolving shafting, attached one end to the bundle, and sufficient tension being put on the other end of the rope to ensure friction, the sack was drawn up as by a crane. A bundle of sacks was drawn too far and stuck between the shafting and the ceiling. The appellant, to free the bundle, cut the rope. The bundle fell, and falling on the bundle on which the appellant was standing caused him to lose his balance. In his effort to recover equilibrium one arm got entangled with the rope which was round the shafting, he was pulled over the shafting and severely injured."

The county court judge was of opinion that the method of hoisting the sacks adopted by the appellant, though unwise, was adopted for the purpose of carrying out more expeditiously the work entrusted to him by his employers and not for his own pleasure or convenience, and found that the accident arose out and in the course of his employment. He therefore made an award in favour of the appellant.

The Court of Appeal (Cozens-Hardy M.R., Buckley and Hamilton L.JJ.) reversed the decision of the county court judge

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on the ground that there was no evidence that the accident arose out of the appellant's employment.

1913. Oct. 30, 31. *H. C. Davenport* and *T. H. Parry*, for the appellant. The appellant was not acting in disobedience to any orders in adopting this particular method of stacking the bundles and he was doing the work he was employed to do. The mere fact that the method he adopted was unreasonable is not a ground for depriving him of compensation, when, as the arbitrator finds, it was done not for his greater convenience, pleasure, or profit, but the better to discharge his duty in the interests of his employers. The question whether this accident arose out of the man's employment was a question of fact for the arbitrator, and, there being evidence to support his finding, it was not competent to the Court of Appeal to disturb it. The authorities shew that even gross disobedience to orders is not a ground for depriving a man of compensation: *Conway* v. *Pumpherston Oil Co.* (1); *Harding* v. *Brynddu Colliery Co.* (2); *Watkins* v. *Guest, Keen & Nettlefolds.* (3) Then is it to be said that a man may recover when he is doing a forbidden act but may not recover when he is doing an act which is merely unauthorized? There is no difference between a workman resorting to a dangerous place, as happened in each of those cases, and a workman resorting to a dangerous method of carrying out his work. *Barnes* v. *Nunnery Colliery Co.* (4) is distinguishable from the present case because there the boy was on his way to his work and was using a dangerous method of transit for his own convenience. The test is whether the workman was acting within the sphere of his employment: *Whitehead* v. *Reader* (5), per Collins L.J., and Buckley L.J. was wrong in this case in applying as the test the reasonableness of the workman in the discharge of his duties. That is not the same thing as saying that the risk must be reasonably incidental, which means "properly incidental," to the man's employment. That condition is fulfilled if a man is

(1) 1911 S. C. 660.
(2) [1911] 2 K. B. 747.
(3) 5 B. W. C. C. 307.
(4) [1912] A. C. 44.
(5) [1901] 2 K. B. 48.

doing what he was employed to do, though in a careless and dangerous manner: *Richard Evans & Co.* v. *Astley* (1), per Earl Loreburn L.C. That exactly applies to this case.

[LORD DUNEDIN referred to *Halvorsen* v. *Salvesen.* (2)]

Scott Fox, K.C., and *Kingsley Chappell*, for the respondents, were not called upon.

The House took time for consideration.

Dec. 9. VISCOUNT HALDANE L.C. My Lords, in this case I have had the advantage of reading the judgment prepared by my noble and learned friend Lord Dunedin, and I entirely concur in it.

Lord Kinnear desires me to express his concurrence also in the judgment of my noble and learned friend.

LORD DUNEDIN. My Lords, I have not the slightest doubt as to the soundness of the judgment appealed from. As, however, we had the benefit of a very able argument and a copious citation of authorities, it may be of use to formulate the conclusions at which I have arrived.

The facts of the case are simple. [His Lordship stated the facts as above set out, and continued:]

The question for decision is, Did the accident arise out of his employment?

The Court of Appeal held that it did not, and I agree with them.

It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward,

(1) [1911] A. C. 674, at p. 678. (2) 1912 S. C. 99.

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and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

Under this reservation, I propose shortly to examine some of the tests which have been found useful in the various cases which have occurred where the point was whether or not the accident arose out of the employment.

The first and most useful is contained in the expression "scope" or "sphere of employment." The expression was used in an early case, the case of *Whitehead* v. *Reader* (1), by Collins L.J., who pointed out that the question of whether a servant had violated an order was not conclusive of whether an accident so caused did or did not arise out of the employment and put as the test, Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?

In the case of *Conway* v. *Pumpherston Oil Co.* (2), in the Court of Session, I adopted the phrase of Collins L.J., and pointed out that there were two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment—the first, when he did work which he was not engaged to perform, and the second, when he went into a territory with which he had nothing to do. This case was approved and followed by the Court of Appeal in *Harding* v. *Brynddu Colliery Co.* (3) The expression has been used in many other cases which it would be tedious and unnecessary to cite.

I am of opinion that this test is both sound and convenient, but it is not exhaustive, and it is not the most convenient for every statement of facts. Taken as it is, there may, and often will, be circumstances in which the application may be difficult and opinions may differ.

I pause here to notice an ingenious argument proposed by Mr.

(1) [1901] 2 K. B. 48. (2) 1911 S. C. 660.
(3) [1911] 2 K. B. 747.

Davenport, founded on the cases I have cited. Founding on the cases of *Conway* (1) and *Harding* (2), he said, If this man had been told not to touch this shaft he would have received compensation, for he was doing his master's work, and it would have been merely disobedience. Why should he be worse off because he was told nothing about the shaft? The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

In the case of *Barnes* v. *Nunnery Colliery Co.* (3) Lord Moulton put it thus: "The boy was only guilty of disobedience. Was this out of the scope of his employment, or only a piece of misconduct in his employment?" Though Lord Moulton arrived at a different result on the facts from that of the majority of the Court of Appeal, and that of this House, yet no fault is to be found with the question as put, and in this House Lord Loreburn L.C. said the same thing in other words, "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs, a thing they were not employed to do, and which they had been expressly told not to do. But I imagine the proposition is equally true if he had expressed it disjunctively and used the word "or" instead of "also."

In the cases in which there is no prohibition to deal with, the sphere must be determined upon a general view of the nature of the employment and its duties. If the workman was doing those

(1) [1901] 2 K. B. 48. (2) [1911] 2 K. B. 747.
(3) (1910) 4 B. W. C. C. 43; [1912] A. C. 44.

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duties he was within, if not he was without, or, to use my own words in the case of *Kerr* v. *William Baird & Co.* (1), an accident does not arise "out of the employment" if at the time the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances.

One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the workman must prove to shew that a risk was an employment risk, or what the employer must prove to shew it was not an employment risk.

As regards the first branch, I think the point is very accurately expressed by the Master of the Rolls in the case of *Craske* v. *Wigan* (2), where he says: "It is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'"

As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustrations the two lightning cases of *Kelly* v. *Kerry County Council* (3) and *Andrew* v. *Failsworth Industrial Society* (4),

(1) 1911 S. C. 701.
(2) [1909] 2 K. B. 635.
(3) (1908) 42 I. L. T. R. 23.
(4) [1904] 2 K. B. 32.

where on the facts the stroke of lightning was held, in the Irish case, to be a common risk of all mankind, in the English case, a risk to which, by the conditions of employment, the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided.

An illustration of the second proposition will be found in the case already cited of *Barnes* v. *Nunnery Colliery Co.* (1), where Lord Atkinson said: "The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter." Lord Atkinson added the words "It was not, therefore, reasonably incidental to his employment. That is the crucial test." In the case of *Watkins* v. *Guest, Keen & Nettlefolds* (2) Lord Moulton criticized this sentence as cutting out the sub-section as to serious and wilful misconduct. With great deference to my noble and learned friend, I think he was forgetting that Lord Atkinson was only applying a test, and not substituting it for the words of the Act. I cannot see that the serious and wilful misconduct section really introduces any difficulty. Reverting to the words of the Act, you have first to shew that the accident arises out of the employment. Then in the older Act came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act to cases where the injury did not result in death or serious and permanent disablement. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment. I have forborne to comment on the particular application to the facts of each case of the principles laid down in them. But, in view of

(1) [1912] A. C. 44, at p. 50. (2) 5 B. W. C. C. 307.

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what has been said, I think I must add that in my view the judgment of Buckley L.J., who dissented in *Watkins' Case* (1), was more in accordance with what had been been laid down in this House in the case of *Barnes* v. *Nunnery Colliery Co.* (2) than the judgment of the majority.

Tried by either of the two tests I have examined, the appellant in this case seems to me equally to fail. But he does fail, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new and added peril, but because he has failed to shew any circumstances which could justify a finding that the accident to him arose "out of his employment."

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, December 9, 1913.

Solicitors for appellant: *Hurford & Taylor, for J. B. Marston, Wrexham.*

Solicitors for respondents: *Pritchard, Englefield & Co., for J. H. Glover, Liverpool.*

(1) 5 B. W. C. C. 307. (2) [1912] A. C. 44.

[HOUSE OF LORDS.]

CHARRINGTON & CO., LIMITED . . . . APPELLANTS; AND WOODER . . . . . RESPONDENT.

H. L. (E.)* 1913 Dec. 10.

ET E CONTRA.

Lease—Covenant—Construction—Licensed Premises—Tied House—"Market Price" of Beer.

A London brewing company demised a public-house to a publican, who covenanted to deal exclusively with the lessors for beer, provided they should be willing to supply the same to him at the fair market price. It appeared that the great bulk of the London brewers' trade was done with tied houses; that the London brewers supplied beer at standard prices; that in the case of tied houses discount was allowed at certain recognized rates; but that in the case of free tenants the amount of discount was the subject of special bargain, and that free tenants often obtained a higher rate of discount:—

Held, that the term "market" was to be construed with reference to the surrounding circumstances, and that upon the true construction of the proviso the lessee was to be charged the fair market price as applying to tenants of tied houses and was not entitled to discount beyond the recognized rates.

Decision of the Court of Appeal reversed on this point.

APPEAL and cross-appeal from an order of the Court of Appeal.

The appellants were brewers of London and Burton-on-Trent and owned a large number of public-houses in London. By an indenture of underlease dated July 4, 1900, the appellants demised the fully-licensed house known as "the Bay Malton" in Great Portland Street, London, to the respondent, a licensed victualler, for a term of seventy-four years from Midsummer, 1897, at an annual rental of 105*l.* per annum, but subject to the payment of further rent in case the lessee should fail to observe the obligations under the covenant set out below. The lessee covenanted (inter alia) as follows: "And also that he the lessee his executors administrators underlessees or assigns will deal exclusively with the lessors or their successors in business or other the

* *Present:* VISCOUNT HALDANE L.C., LORD KINNEAR, LORD DUNEDIN, and LORD ATKINSON.

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assignees of the benefit of this covenant for all malt liquors which shall be sold disposed of or consumed upon the said premises or shall be brought thereon to be so sold disposed of or consumed and will not upon any pretence whatever during the said term upon the said premises directly or indirectly buy receive sell dispose of or have in his or their possession or either directly or indirectly permit to be bought received sold or disposed of or consumed in upon out of or about the said premises or any part thereof any porter stout ale beer or other malt liquor whatsoever other than such as shall have been bona fide purchased of the lessors or their successors in the business or other the assignees of the benefit of this covenant provided they shall be willing to supply the same to the lessee at the fair market price and with the intent that this present covenant shall run with the said premises and be enforcible by the person or persons for the time being entitled to the reversion in the said premises and bind any assignee tenant or occupier thereof for the time being."

On August 25, 1911, the appellants brought an action against the respondent to recover a sum of 298*l.* 5*s.* 8*d.*, being the balance of the appellants' account against the respondent for beer and other malt liquors sold and delivered to him at the Bay Malton.

By his defence and counter-claim the respondent alleged that the prices charged were in excess of the fair market prices for the goods supplied and counterclaimed for (1.) an account of all moneys paid by him in respect of malt liquors supplied by the appellants and of the amounts due to the appellants from the respondent for such liquors and repayment of any amount overpaid. (2.) A declaration that on the true construction of the agreements and covenants between the parties the appellants were not entitled to charge the respondent prices higher than the ordinary market prices charged to persons who were not tied. (3.) A declaration that on the true construction of the covenants and agreements between the parties the appellants were not entitled to object to the respondent purchasing his malt liquors from persons other than the appellants unless the appellants were willing to supply the respondent with such malt liquors at prices not higher than those charged in the open market and to

persons who were not tied. (4.) A declaration that the respondent had not committed any breach of the covenants in the indenture of underlease and an injunction to restrain the appellants from taking any steps to re-enter upon the demised premises or to eject the respondent therefrom. (5) Damages for breach of contract.

The action was tried before Lord Alverstone C.J. and a special jury.

At the trial evidence was adduced as to the prices charged by London brewers for the various kinds of beer supplied by them. The effect of this evidence is stated at length in the judgment of the Lord Chancellor. It may be shortly summarized as follows: Between 1895 and 1900 London brewers bought up a very large number of licensed houses with the result that the number of tied houses was enormously increased, and since 1901 about 93 per cent. of the public-houses in London were tied houses. Beer was supplied at standard prices to all customers alike subject to certain discounts. In the case of tied tenants the brewers allowed a fixed discount of 5 per cent. on London beers, and on Burton beer a discount regulated by a sliding scale and varying from 10 per cent. to 17½ per cent. according to the quantity sold to the tenant per annum. In the case of free tenants the rate of discount was usually the subject of special bargain, and as a consequence free tenants often obtained discounts largely in excess of the recognized rates. In a few exceptional cases special arrangements were also made with tied tenants.

The appellants allowed the respondent a discount of 5 per cent. on London beers and a discount of 17½ per cent. on Burton beers.

Lord Alverstone C J. ruled that there was no defence to the claim for the 298*l.*, and upon the counter-claim he left it to the jury to say whether the prices charged were the fair market prices, and if not what further discounts ought to be allowed.

The jury found that there were two market prices, one for tied and one for free houses, and that the respondent had been charged the fair market price as applied to a tied house. Thereupon the Lord Chief Justice gave judgment for the appellants upon the claim and counter-claim.

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The respondent applied to the Court of Appeal for a new trial on the ground of misdirection.

The Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.) held, first (Buckley L.J. dissenting), that the judgment upon the claim ought to stand, and, secondly, that there ought to be a new trial as to the counter-claim. Upon the second point the Lords Justices were of opinion that they were bound by the case of *Russell* v. *Crawford* (1)—a previous decision of that Court (Lord Alverstone C.J., Fletcher Moulton and Buckley L.JJ., the Lord Chief Justice doubting but not formally dissenting)—to hold that "the fair market price" meant the price at which the tenant if he were not tied could buy in the open market.

The appellants appealed from this decision in so far as it ordered a new trial, and there was a cross-appeal by the respondent in so far as the Court refused to extend the new trial to the claim.

1913. Oct. 31; Nov. 3, 4. *Sir R. Finlay, K.C.*, and *Holman Gregory, K.C.* (with them *H. A. McCardie*), for the appellants. The substantial question is whether upon the construction of the words "the fair market price" in the proviso to this covenant the respondent is entitled to have beer supplied to him at the price at which it would be supplied in the open market. In construing this covenant regard must be had to the surrounding circumstances, as to which parol evidence is admissible: *Bank of New Zealand* v. *Simpson*. (2) Therefore the evidence as to the prices at which beer is supplied by London brewers to tied houses is not irrelevant. Having regard to the surrounding circumstances, the words of the proviso mean the fair market price in reference to tied houses: *Arnold Perrett & Co.* v. *Radford*. (3) The protection afforded to the respondent by this covenant is that he shall be entitled to get his beer at the price which is normally charged to tenants in his position. In the circumstances it is impossible to apply a covenant of this kind to free houses. Further, the prices charged are the same for tied

(1) Unreported. July 21, 1910. (2) [1900] A. C. 182.
(3) (1901) 17 Times L. R. 301.

houses and free houses, apart from special arrangements, which are more common in regard to free tenants, and these special arrangements are such that it is impossible to say there is a market price for beer for free houses. The discount is a matter of special bargain in each case. In the ordinary sense there is no open market for beer; there is no place where brewers and dealers meet. The fair market price does not mean the lowest price at which beer can be bought by anybody, but means the ruling price. There are so many tied houses that practically they form a market for themselves, and the word "fair" is used to prevent the prices being artificially run up. The jury have found that the respondent has been charged the fair market price and their additional finding comes to nothing; as a matter of law it cannot stand and it should be disregarded. The Court of Appeal went wrong in following a previous decision of their own—*Russell* v. *Crawford* (1)—where there was an absence of evidence that there was a market for beer supplied to tied houses. *Russell* v. *Crawford* (1) is erroneous if it is sought to apply it to the facts in evidence in this case. Assuming that the respondent has been charged more than the fair market price the proviso is merely a condition and his only remedy is to go elsewhere for his beer. There is no implied covenant by the appellants to supply beer at the fair market price. [Upon this point they referred to *Williams* v. *Burrell* (2); *Cannock* v. *Jones* (3); *Wolveridge* v. *Steward* (4); *Treloar* v. *Bigge*. (5)] In any event the new trial should not extend to the claim, for the respondent has accepted the goods without demur, and a tenant cannot both approbate and reprobate: *Croft* v. *Lumley*. (6)

J. F. P. Rawlinson, K.C., and *Douglas Hogg*, for the respondent. The Lord Chief Justice gave no proper direction to the jury as to the meaning of the fair market price. He ought to have ruled either one way or the other, and the verdict of the jury that there can be two market prices cannot be defended. "Market" implies some sort of freedom in the person who has to buy the goods. It is not contended that the market

(1) Unreported.
(2) (1845) 1 C. B. 402.
(3) (1849) 3 Ex. 233.
(4) (1833) 1 Cr. & M. 644.
(5) (1874) L. R. 9 Ex. 151.
(6) (1858) 6 H. L. C. 672, at p. 706.

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price means the lowest possible price, but the test is this: What would the respondent have got his beer for without exerting any special pressure if there were no tie? The market does not apply to the sellers only but to the buyers also. The word "market" in this context always means the open market and the evidence is given on that assumption; it is an inappropriate term as applied to tied tenants. There is no difficulty in ascertaining the market price of beer for free customers. It has been assumed that the only sale is to licensed houses, but large quantities of beer are sold to clubs and "club" prices must be looked at as well as "free house" prices. There is no covenant by the appellants to supply beer, but if they do supply it there is an implied obligation to supply it at the fair market price. There is no obligation on the appellants to supply their own beer. Therefore the question is, What is the fair market price of beer of the quality delivered to the respondent? That is a question which is solved by juries every day. Further, the term "market price" is an unambiguous term, as is shewn by the fact that it is used in ss. 50 and 51 of the Sale of Goods Act, 1893, without any definition. Evidence of the surrounding circumstances is therefore inadmissible. If this House confines the market to tied tenants it is not really construing the covenant, but is making another covenant for the parties. The order for a new trial should extend to the claim also.

Holman Gregory, K.C., in reply. Order xxxix., r. 6, shews that a new trial will not be granted on the ground of misdirection unless some substantial miscarriage has been thereby occasioned.

The House took time for consideration.

Dec. 10. VISCOUNT HALDANE L.C. My Lords, if the appellants are right in their construction of the covenant in the underlease of July 4, 1900, I think that they are entitled to succeed, both on their claim and on the respondent's counterclaim in the action. For the only real question is that of the construction of the covenant in question. It is suggested for the respondent that he is entitled to a new trial on the ground that

Lord Alverstone C.J. ought to have left to the jury as a separate question whether, even on the footing that the fair market price was the price to the lessee of a tied house, fair market prices were charged on that footing. But I do not think that the respondent really asked that such an issue should be put to a jury, and he brought forward no evidence on which he could have succeeded on it. The real point to be determined is whether the language of the covenant means that the fair market price was the price to be paid by a tenant of a tied house, as distinguished from the price at which beer could be bought in an altogether open market.

My Lords, it is evident that the Court of Appeal and the Lord Chief Justice himself were much influenced by the previous decision of the Court of Appeal in *Russell* v. *Crawford* (1), a decision to which the Lord Chief Justice was a party. There it had been held that in an analogous covenant the words "fair current market price" meant the market price between people unrestricted in their right of bargaining.

My Lords, we have to construe the covenant in the present case, not abstractly, but in the light of the circumstances to which it applied. If the language of a written contract has a definite and unambiguous meaning, parol evidence is not admissible to shew that the parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation, evidence is admissible to shew what were the facts to which the contract relates. If there are circumstances which the parties must be taken to have had in view when entering into the contract, it is necessary that the Court which construes the contract should have these circumstances before it.

The covenant in the present case was directed to the circumstances of the London brewers' trade. There was evidence as to these circumstances of a kind which did not appear in *Russell* v. *Crawford* (1), and which ought, I think, to have made the Court of Appeal hesitate before treating that case as governing the present one.

My Lords, it was proved in this case that all the principal

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London brewers, including the appellants, supply their malt liquors to their customers at fixed standard prices which the brewers have agreed on among themselves. The net price is based on the standard price in every case, whether the customer is a publican who owns a tied house or a free house, any differences made consisting in variations of discount allowed on the standard prices. The ordinary discount is 5 per cent. on the price of London beers. On Burton beers the discount is on a sliding scale depending on the amount of trade, and it varies from 10 per cent. to 17½ per cent. Discounts beyond these amounts are matter of special bargain. There is no fixed scale for untied buyers, but they bargain individually and sometimes, but by no means always, obtain discounts substantially in excess of the ordinary discount. So at times do the individual tenants of tied houses, but not to the same extent. The respondent was allowed the ordinary 5 per cent. discount on London beer bought by him from the appellants, and 17½ per cent. on Burton beer. It was proved that the great bulk of the trade of the London brewers is done with tied houses. Of about 6300 licensed houses in London (excluding off-licences) 93 per cent. are tied, 90 per cent. by covenant and 3 per cent. by loan. The appellants themselves have 590 tied houses to which they charge the standard prices less discounts on the scale I have mentioned with reference to tied houses. Then they have 6 free houses to which they charge the standard price with similar discounts, and 7 free houses to which they charge them with extra discounts.

These facts having been proved, the Lord Chief Justice left to the jury the question whether the beers supplied to the respondent were charged to him at fair market prices, meaning by that the standard prices less the usual discounts. The jury found that there were two market prices, one for tied and one for free houses, and that the respondent had been charged the fair market price as applying to a tied house. On this finding the Lord Chief Justice entered judgment for the appellants on their claim for the price of beer delivered to the respondent, and for the appellants also on the counter-claim of the respondent for a declaration that the appellants were not entitled to charge him

prices higher than the ordinary market prices charged to persons who were not tied.

The Court of Appeal, following its previous decision in *Russell* v. *Crawford* (1), took a different view and reversed the judgment so far as the counter-claim was concerned, but affirmed the judgment for the appellants on their claim for goods delivered, and ordered a new trial on the issue raised by their counter-claim. They held that the words "market price" made it impossible to look at the prices to tied houses, and must be taken to mean the prices in the open market.

My Lords, in the face of the evidence which was given, I do not think that this judgment on the counter-claim can stand. What is the fair market price must depend on what is meant by the market, and this must be ascertained by reference to the facts proved. The great bulk of the business of the London brewers is transacted with the tenants of their tied houses. These tenants bid for these houses, and they know that the terms on which they get the right to be supplied with malt liquor are that they should take it exclusively from the owning brewer at the standard price less certain discounts, the variation of which was to be limited by the prevailing practice. This seems to me to be the well understood meaning of the term "market" in this connection, and I do not believe that the respondent when he entered into his contract understood it in any other sense. "Market" is a word covering a variety of possible forms, and the evidence appears to me to establish that it had a special significance in the trade done in tied houses with the London brewers. The fallacy in the view taken by the Court of Appeal appears to me to have been that they endeavoured to interpret the covenant without reference to the circumstances of the particular trade and of the situation of the parties who entered into the contracts contained in the leases.

As the result, I think that judgment ought to be entered for the appellants on both their claim and on the counter-claim, the order for a new trial being discharged. I think further that, for the reasons which I have already given, there is in reality no other question before us. The appellants ought to have their costs here and in the Courts below. I move accordingly.

(1) Unreported.

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LORD KINNEAR. (1) My Lords, I agree with the judgment of the Lord Chancellor. The question depends upon the meaning and effect of a proviso in the sub-lease, by which the obligation of the lessee to deal exclusively with the lessors for all malt liquors which shall be sold or consumed upon the premises is made to depend upon their being "willing to supply the same to the lessee at the fair market price." I am unable to accept the contention that the term "market price" has a fixed and definite meaning which must attach to it invariably, in whatever contract it may occur, irrespectively of the context or the surrounding circumstances. The argument was rested chiefly on the force which, it is said, must be given to the word "market." In a different connection this may be a technical term, but in the covenant in question it is not used in any technical sense, and in ordinary language it is a common word of the most general import. It may mean a place set apart for trading, it may mean simply purchase and sale; and in either sense, there are innumerable markets each with its own customs and conditions. Words of this kind must vary in their signification with the particular objects to which the language is directed; and it follows that a contract about a market price cannot be correctly interpreted or applied without reference to the facts to which the contract relates. It is said that this involves a violation of the rule which does not allow a written instrument to be varied by oral evidence. But the objection is, in my opinion, groundless. Evidence is not admissible to put a peculiar meaning upon plain and unambiguous words. But it may be necessary to prove the relation of the document to facts; and I take it to be sound doctrine that for this purpose evidence may be given to prove any fact to which it refers, or may probably refer, or to identify any person or thing mentioned in it. In so stating the law, I am using the language of Sir James Stephen; and, accepting his doctrine as I do, I cannot think it doubtful that, in order to interpret the contract before us, we must know the facts about which the parties were bargaining and consider the circumstances of the market to which they refer as that in which they propose to deal.

(1) Read by Lord Dunedin.

I do not examine the evidence in detail, because I agree with what is said about it by the Lord Chancellor and by my noble and learned friends, whose judgments I have had the advantage of reading, and the result is that in the ordinary course of trade the appellants and other London brewers supply their customers with malt liquors at standard prices which they fix by agreement among themselves, but on actual sales discounts are allowed at certain rates. The discount allowed to licensees of tied houses on London beers is nearly uniform, and on Burton beers it is fixed according to a sliding scale. Farther discounts are generally allowed to untied houses, but these are made at varying rates, and as the result of special bargains. The net price to untied houses is thus in general lower than to tied houses. It is material to observe, in this connection, that the great bulk of trade is with tied houses. Of 6300 licensed houses 93 per cent. are tied, 90 per cent. by covenant and 3 per cent. by loan; and the appellants themselves have 590 tied houses, 6 free houses to which they charge the standard price with the same discounts as are allowed to the tied houses, and 7 free houses to which they give a larger discount. In these circumstances, the jury found that there are two market prices, one for tied and one for free houses, and that the respondent had been charged the fair market price as applying to a tied house; and on this finding the Lord Chief Justice entered judgment for the appellants. It is said that this judgment cannot stand, because the jury ought not to have considered the prices charged to tied houses, and ought to have been so directed, since the words "market price" exclude tied houses from consideration. The Court of Appeal has given effect to this view. But, with great respect, I find nothing in the language of the covenant to support this restriction. It is not the open market price but a fair market price which is to be the stipulated standard. The words seem to me to refer to the conditions of purchase and sale in the particular trade contemplated by the contract, and to the relations which the contract creates. If the prices charged to the respondent are those charged by London brewers generally, and accepted by the great mass of their customers, there may still be a question whether they are fair prices or not, but they are not the less market prices because

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the parties have made a contract of purchase and sale on terms which are generally adopted by the majority of London publicans and the brewers from whom they buy. I cannot, with great respect, agree that these publicans are shut out of the market. The covenant in question is only one part of a complex contract; and the persons who make such contracts, being the great majority of the publicans in London, make or help to make the market. The proposed restriction which would exclude the great mass of the trade from consideration thus appears to me to be arbitrary. The question as to the fairness of the prices still remains; but that is decided by the verdict of the jury.

LORD DUNEDIN. My Lords, I concur. I cannot agree with the view that the term "market" has any fixed legal significance, and yet that I think is the view on which the judgment of the Court of Appeal, following the authority of *Russell* v. *Crawford* (1), really depends. I do not think it rests with either party to say to the other, "If the meaning is as you contend, why did you not express it otherwise?" Both contentions as to the true meaning can be expressed by a gloss. The appellants say a fair market price means such a price as persons in your situation are ordinarily charged. The respondent says it means the average price at which a man who is not tied can get his beer. If either of these glosses had been expressed there would be no possibility of dispute. It therefore comes back to the question, What is the true interpretation of the expression in the contract?

Now, in order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it—or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As Lord Davey says in the case of *Bank of New Zealand* v. *Simpson* (2), quoting from a decision of Lord Blackburn's, "The general rule seems to be that all facts are admissible (to proof) which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used."

(1) Unreported. (2) [1900] A. C. at p. 188.

The circumstances found are that there are in London a vast number of tied houses and comparatively few free, and that for the tied houses there is a recognized price charged by the brewers for the two kinds of beer and a recognized discount on these prices. In the case of free houses the price of beer is the same, but the discount is made matter of special bargain, and often exceeds the discount allowed to the tied houses. I mention this as the result of the evidence—evidence which, had the case been tried, as I think it ought to have been, by a judge without a jury, would have been that on which the Court would have proceeded to interpret the contract. But the trial having been by a jury, we must, I think, take the findings of the jury as we get them, unless we ought to say these findings are unsupportable on the evidence. I do not think that can be said. The jury accordingly have found that there *is* a market for tied houses and that the price charged to the respondent is a fair price to a tied house. They also add that there is a market price for houses not tied.

On such a finding, which I cannot say was not justified by the evidence, I think that the Lord Chief Justice was right in directing the verdict to be entered for the plaintiffs. In so doing he doubtless construed the contract, but I think he construed it rightly. He was entitled, I think, to consider the facts of the case for himself so far as the import of facts was not explained for him by the findings of the jury, along with those findings.

So doing, he came to the conclusion I should have come to, namely, that the market which the parties meant in the contract was the market for tied houses—in other words, that the expression was really equivalent to standard price charged by brewers to tied houses.

The Court of Appeal overruled this view, because they held that the verdict of the jury could not stand consistently with the law laid down in *Russell*. (1) That law is thus expressed by Vaughan Williams L.J.: "The finding of the jury . . . . cannot stand . . . . because such a finding is inconsistent with the decision in *Russell* v. *Crawford* (1), which decision is expressed

(1) Unreported.

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by Fletcher Moulton L.J. in these words: 'To my mind the words "market price" are absolutely fatal to the idea that you are to look at the price to tied houses.'"

With that, as I said, I cannot agree. There is no authority that "market" is a term of fixed legal significance. You have always to ask yourself "what market," and in the sense of there being a ruling price it is just as easy to think of a market for tied houses as a market for free houses. And so the jury have found.

I should like to say, in conclusion, that although, of course, this case must be determined by the true interpretation of the words used, and the appellants must have suffered, whatever they intended, if the expressions made use of had gone beyond what they intended; yet I have no moral doubt or misgiving that the judgment we are now to pronounce is in accordance with what the parties really intended. Not only did the respondent not raise this question for ten years after the contract, but he says in his evidence, "I really did not know at what price I could obtain beer in the open market, and I never have known till recently."

LORD ATKINSON. My Lords, this is an appeal from so much of an order of the Court of Appeal, dated December 12, 1912, as reverses the judgment entered for the plaintiffs on the defendant's counter-claim by the Lord Chief Justice, in an action brought by the appellant company against the respondent to recover the sum of 298*l.* 5*s.* 8*d.*, balance of an account due for goods sold and delivered, and as awards a new trial of this counter-claim.

The facts, which are not complicated, have been already stated with sufficient fulness, and I do not presume to repeat them.

The covenant in the sub-lease on which the defendant relies binds the lessee to deal exclusively with the lessors for all malt liquors he sells or brings upon the demised premises, provided the lessors be ready to supply these liquors at the fair market price.

In this state of circumstances the appellants, on August 25, 1911, instituted an action under Order XIV. to recover from the

respondent the sum of 298*l.*, balance of an account for goods sold and delivered.

The respondent filed a defence and counter-claim praying certain relief.

To this defence and counter-claim a replication was filed by the appellants. It is, I think, plain from these pleadings that the three substantial questions intended to be raised by them are:—

1. The right of the defendant to have beers supplied to him at the prices, or market prices, charged to persons who were not tied;

2. The right to cease to deal with the plaintiffs if they refused to supply their beers to him at those prices;

3. The right to recover damages from the plaintiffs for breach of covenant in refusing to supply him with their beers at those prices; and

4. The right to have the settled account opened, and the plaintiffs required to account for the moneys received by them.

There is nothing in the pleadings or in the course of the trial to suggest that the prices charged were other than those universally demanded from the lessees of tied houses, or were in themselves exorbitant. That case was not made at the trial, and should not be permitted to be made now. The evidence would lead one to the conclusion that a tied house supplied at the net prices charged to untied houses would be, if not an anomaly, certainly an exception to the general rule adopted by almost all the London brewers, and admittedly adopted by the plaintiff company. Of the 603 accounts the appellants have in the London area, 580 are with licensees tied to them by covenant, 10 tied to them by loan, as it is called, and only 13 free, all the licensees of tied houses being charged the same prices as those charged to the defendant.

Lord Alverstone, before whom and a special jury the case was tried, ruled that there was no defence to the plaintiffs' claim and entered judgment for the amount claimed with costs. The majority of the Court of Appeal approved of that ruling. I respectfully concur with them, and think it was clearly right.

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Abundant evidence was given as to the prices charged to the licensees of houses both tied and free. The following passage in the Lord Chief Justice's summing up contains I think the pith of the whole. He said: "Gentlemen, I have done my best to assist you; I really do not know whether I have been successful or not. It is difficult enough, but you have got to answer this question: Were the beers supplied to Mr. Wooder up to August, 1911, charged to him at fair market prices, meaning by that the standard less 5 per cent. for London and 17½ per cent. for Burton? If you think they were you need consider no more. I do not go over the case again. The fact that with full knowledge of them they were paid without any direct complaint to Charringtons is only a circumstance. If on the whole evidence you think that the prices were too high you will please say what extra discount you think ought to be allowed."

The jury subsequently asked the Chief Justice whether the defendant was a tied tenant. He answered "Yes," and they then asked if there could be two prices, and he replied that that was for them to decide.

The jury, in answer to the questions left to them, found that there were two market prices—one for tied houses and one for free—and that "the defendant had been charged the fair market price as applying to a tied house." The learned Chief Justice thereupon entered judgment for the plaintiffs on the counterclaim. This verdict and judgment have been set aside by the unanimous judgment of the Court of Appeal, for misdirection, and a new trial has been awarded, as I understand it, on the ground that on the true construction of the covenant contained in the lease the words "fair market price" refer to the fair market price charged to untied houses, that the Lord Chief Justice should have so instructed the jury, and have asked them to find what that fair market price was. Before dealing with the decision of the Court of Appeal on these two points it is necessary to determine what were, on the true construction of this covenant, the reciprocal rights and obligations of the two contracting parties, apart from the question of the precise meaning to be given to the words "fair market price" as used in the covenant.

On the authority of *Wolveridge* v. *Steward* (1) and *Treloar* v. *Bigge* (2), it is, I think, clear that under this covenant the appellants were not bound to supply any beer whatever to the respondent. It is quite optional with them to do so. If they do supply it they can only charge "a fair market price," whatever that may mean, and if they decline to sell to the respondent at all, or demand a price higher than the fair market price, the respondent's only remedy is to cease to deal with them and deal elsewhere. He has, therefore, no right whatever to sue as he has sued for damages for breach of covenant.

Upon the other point, namely, the meaning of the words "fair market price," the authorities stand thus: In the case of *Arnold Perrett & Co.* v. *Radford* (3), tried at the Gloucester Assizes before Wright J., that very learned and accurate judge held that in a covenant in a lease of a tied house very similar to the covenant in question in the present case the words "fair current market price" meant a price which was fair and current in the case of tied houses, which was not in excess of the general market rate, and that the price did not cease to be fair and current because the tenants of free houses who were exceptionally circumstanced obtained lower prices by special bargains. The facts of the case were these. In Gloucester, as in London, the vast majority of the licensed houses are tied similarly to the defendant's. Houses to the number of 210 were tied out of a total of 219. The mode in which the trade was carried on there was this. The brewers issued price lists which were practically identical the one with the other, and supplied the tied houses at these prices subject to a discount of 10 per cent. They supplied free houses at the same prices subject to a discount varying with the quantity supplied, or with other special circumstances, but ordinarily amounting to 20 per cent., and sometimes to 25 per cent. They supplied the general public at the full list prices, subject to any discount which might be specially agreed upon in any particular case. Wright J. did not consider that the meaning of the words "fair current market price" as used in the particular covenant could be determined in the abstract and without

(1) 1 Cr. & M. 644. (2) L. R. 9 Ex. 151.
(3) 17 Times L. R. 301.

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due regard to the condition of the trade in the locality in which the tied houses were situated, and to the mode in which and the method by which that trade was carried on. On the contrary, he said: "The expression 'the fair current market price' is not, as it seems to me, equivalent to the expression 'the lowest price at which the tenant could buy.' The word 'fair' and the word 'current' seem to import some reference to the general conditions of the particular trade and to the nature of the relations between the parties, and to mean in substance what is current and fair in the case of tied houses and not in excess of the general market rate. The landlord would not establish his case merely by showing that his charges were the same as those of other brewers, if it appeared that the brewers generally were maintaining an excessive scale of prices; but if he shows that his prices are the prices usual and general under the circumstances, and if it is not made to appear that those prices are such as to leave an unreasonable profit or to be in excess of the prices charged in the general course of the trade, I do not think that he ought to be held to have broken his contract merely because there are some cases in which persons exceptionally circumstanced may as matter of special bargain obtain lower prices. In the present case there is no evidence to show that the prices charged are excessive or exceptional. They are the prices universally charged under similar circumstances, and they are materially less than the prices charged to the general public. I think, therefore, that the defence and counter-claim fail."

The next case on the subject was that of *Russell* v. *Crawford*. (1) The appellants in the present case have furnished your Lordships with copies of the pleadings in that case, and with a transcript of the evidence given at the trial, and of the summing up of Darling J., who presided at the trial, as well as a print of the judgment delivered in the Court of Appeal. The material facts which it is essential to consider are as follows: The defendant held a certain licensed public-house called the Pitt's Head, situate in Brunswick Mews, Cumberland Place, in the county of London, under a lease dated December 19, 1889, for a term of 31¼ years less 28 days from June 24, 1889, at the yearly rent of

(1) Unreported.

60*l*. The reversion expectant on the determination of this lease, and the benefit of the covenants contained in it, became on January 11, 1909, vested in the plaintiff. The original lessors were the Belgrave Brewery.

The lease contained a covenant by the lessee that he would buy all his beer from this brewery, and that if he did not do so, and bought it elsewhere, he would pay an additional rent of 100*l*. per annum. The lease contained a covenant by the lessors that they would be willing to supply the lessee with beer at "fair current market prices." The plaintiff was himself a licensed dealer in beer, buying the beer he sold or was willing to sell to the defendant from different breweries. He bought and sold at the same price, which was the regular standard price of beer in London; he was willing to continue to do so, and he gave, and was willing to continue to give, to the defendant a discount of 5 per cent. on these prices, thus dealing with the defendant on the general terms upon which all licensees of tied houses are dealt with by London brewers, but he himself received from the brewers discount at a rate higher than 5 per cent. The defendant demanded a higher rate of discount, refused to take beer supplied by the plaintiff, and dealt elsewhere. Thereupon the plaintiff brought an action to recover the sum of 100*l*. in respect of the penal rent for one year, and damages for breach of covenant. The defendant, in his defence, relied, amongst other things, on this covenant, denying that the plaintiff had been willing to supply him with beer at fair current market prices, which according to him meant the fair current market prices charged to the licensees of free houses. Darling J. ruled that, according to the true construction of the covenant, the words in controversy applied to the licensees of tied houses exclusively, and left to the jury the question, Was the plaintiff willing to supply beer to the defendant at fair current market prices? To which they answered "Yes." No evidence was given such as was given in the present case as to the vast preponderance of tied over untied houses in the London area, or as to the matters which Wright J. considered such helps in arriving at the meaning to be attributed to the disputed words, namely, "the general conditions and course of the trade and the relations between the

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contracting parties." The evidence was mainly, if not altogether, confined to the discount on the standard price allowed to tied tenants and free tenants respectively.

The Court of Appeal reversed the decision of Darling J. as to the defendant's liability for the increased rents, and directed a new trial of that question.

I have read and re-read most carefully the judgments delivered in the Court of Appeal. The judgment of Fletcher Moulton L.J., as he then was, with all respect, appears to me to turn almost altogether on the meaning of the word "market." He attributes to the word its primary meaning. At p. 302 he says: "Fair current market prices are settled by the operations of the great causes supply and demand. They are actually fixed by what is called the higgling of the market. . . . . I have not the slightest hesitation in saying that the normal meaning of such a contract is that you have to see what the fair current market price between people free to bargain is, and that that is the price which is to be taken as the price at which the purchase and the sale on these non-free conditions are to be taken to have been made." On the following page he says: "There are free houses. The free houses can pick and choose the persons from whom they will buy. . . . . To my mind the words 'market price' are absolutely fatal to the contention that you are to look at the prices to tied houses. The essence of a tied house is that it is banned from the market. When you say that it is to be the fair current market price you are to decide for those who are shut out from the market. But the price to be paid is to be ascertained by looking at the prices which are paid by those who are not shut out from the market."

It is no doubt true that a tied tenant after he has taken his public-house and become tied is shut out from the open market, just as a railway company that has contracted with a mining company for the supply of all its coal for twelve months at a given price is shut out from the market while this contract lasts, but the tied tenant before he entered into his contract was just as free to take, or not to take, a tied house, and buy and sell malt liquors in and through the medium of it, as was the publican who desired to take an untied public-house free to take or not to

take it, to buy beer in the open market and sell it through his untied house. And as 93 per cent. of the publicans of London who are customers of the brewers sell beer in the former way, not the latter, and as all the brewers sell the vastly larger portion of their produce to the former class of licensees, not to the latter, it would certainly seem to me but natural that in these trade bargains the parties to them should use the term "market price," which is not a term of art, in reference to the vast body of these transactions, and not in reference to transactions few in number and of a wholly different character. There does appear to me to be something anomalous from a business point of view in fixing the price of beer for the entire body of publicans, bound and free, by the price paid by the minute fraction of them who happen to be free. The more especially would this be so where, as in this case, according to the evidence, the sales to free tenants are to a great extent sales of a dumped commodity, as it is called, meaning thereby the surplus produce which remains on the manufacturer's hands where his plant has been worked to its highest or to a very high capacity, and the main body of his assured buyers have been supplied.

Buckley L.J. expressed himself thus: "I think that the true direction was that the fair current market price pointed to is, of course, a fair current market price not to a limited class of tied publicans but to publicans generally." I presume he meant by the words "publicans generally" the body of publicans trading in the London trade area, not all the publicans in the British Isles, though these latter are free to buy in the London market; but if he meant the publicans in the London area it seems strange that he should style the tied tenants a limited class, since they are 93 per cent. of the whole. He proceeds: "I rest that opinion upon three grounds. The first ground is this, as to what, looking at the transaction, would probably be the broad fair meaning of the parties. I think the broad fair meaning is this: that on the one hand the owner of the reversion stipulates that the lessee shall buy from him, that he shall have the benefit of dealing with him in these liquors, and that on the other hand the lessee who is to be thus bound is not to be handicapped in his trade, his profits are not to be diminished by reason of that

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covenant, he is only to take that from the lessor if the lessor is prepared to supply him at the price at which he could get it elsewhere if he were not tied by the covenant. On the one hand the lessor is to enjoy the benefit of the tie; on the other hand the lessee is not to lose profit by reason of the tie. I think that is the fair meaning of the stipulation."

The Lord Chief Justice took a somewhat different view. He was apparently of opinion that the prices actually paid by all tied houses in the London area, as well as those paid by the insignificant number of untied houses which exist in that area, should be taken into account in arriving at the meaning of the phrase "fair current market price" used in this covenant. I am not certain that he did not think that the prices charged by brewers to clubs, as well as to all customers other than publicans, should not also be taken into account, and he adhered to this opinion on the trial in the present case. The Court of Appeal appear to me to have adhered in this case to the opinion expressed by them in *Russell* v. *Crawford* (1), though the facts proved in the present case are entirely different from those proved in that case.

I do not think one can determine what the parties to this covenant had in their minds when they used the words "fair market price" by simply considering the meaning of the word "market" and its incidents in the abstract. The word "market" has many meanings. It may mean the exchange of goods or provisions for money, purchase, or the rate of purchase and sale. One says markets are low or high. One says commodities find a quick or ready market, or markets are dull, or one cannot find a market for one's goods—it may mean the opportunity of buying and selling, &c. (See Imperial Dictionary, title "Market," and Webster's Dictionary, same title.)

I concur with Buckley L.J. in thinking that to arrive at a true construction of this covenant one must ask oneself the question, what was the broad fair meaning of the parties to it? In what sense did they use the words "fair current market price"? What did they mean to express by them? Did this company mean to charge this lessee the prices almost universally charged

(1) Unreported.

to tied houses in the London area for the last thirty or forty years, or did they mean only to charge him the prices which they demand for their dumped beers from an insignificant fraction of the whole number of their customers? Moreover, it was proved in evidence that if they sold their beers to their tied customers at these latter prices it would rapidly lead to their own bankruptcy. The defendant deposed that the standard prices, less 25 per cent. discount, would be fair market prices for untied tenants. No reason has been suggested why he should be specially favoured with such a discount, or treated differently from all other tied tenants, and if the prices charged to the latter were not exorbitant, what prices other than these can those words have referred to? In *Grant* v. *Grant* (1) Lord Blackburn adopted and judicially approved of the rule stated by him in his work on Contract of Sale, p. 49. It runs thus: "The general rule seems to be, that all facts are admissible which tend to show the sense which words bear with reference to surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer only intended to use words bearing a particular sense are to be rejected."

In *Bank of New Zealand* v. *Simpson* (2) Lord Davey delivering the judgment approved of this statement of the law.

The fact that so many judges have formed different opinions as to the meaning of these words "fair current market price" and "fair market price," as used in this contract and contracts like it, should suffice in itself to shew that they are susceptible of either of two meanings. If that be so, as I think it is, the relations of the parties and all the surrounding circumstances may be taken into consideration, not to add to or alter their contract, but to interpret it, to shew the nature and quality of the subject-matter, or, in other words, to shew the meaning the parties themselves attached to the language they have used. Viewing the expression "market price" through the light of the surrounding circumstances proved in this case, it is to my mind clear that its meaning was the price at which the appellants sold their beers to the vast preponderance of their customers, the licensees of their tied houses. And by the use of the word

(1) (1870) L. R. 5 C. P. 727. (2) [1900] A. C. 182.

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"fair" it was, I think, simply meant to protect the lessee from being required to pay some extortionate price kept up by combination amongst the brewers, or by some such like device. I do not think that the use of the word "market" excludes this construction.

The jury have found that the defendant had only been charged the fair market price as applied to a tied house. In my view that was all he was entitled to. On the construction of this covenant, which I think the right construction, the evidence given abundantly sustains that conclusion. The facts are all before your Lordships, and Order XXXIX., r. 6, and Order XL., r. 10, of the Rules of the Supreme Court, 1883, therefore apply. This House has full jurisdiction to finally determine the matter in dispute and make such order as justice requires. That order is, in the present case, in my opinion this, that the decision of the Court of Appeal should be reversed with costs, and the order made by the Lord Chief Justice at the trial restored, and this appeal allowed with costs.

Ordered and adjudged that the order of the Court of Appeal so far as complained of in the original appeal be reversed and that judgment be entered for the appellants upon the claim and counterclaim in the terms of the judgment of the Lord Chief Justice of England. Further ordered that the cross-appeal be dismissed. The respondent in the original appeal to pay the costs in the Courts below and also the costs in respect of the appeals to this House.

Lords' Journals, December 10, 1913.

Solicitors for appellants: *Loxley, Elam & Gardner.*
Solicitor for respondent: *S. Tonkin.*

[HOUSE OF LORDS.]

ROWLEY . . . . . APPELLANT;

AND

TOTTENHAM URBAN DISTRICT COUNCIL . RESPONDENTS.

H. L. (E.)*
1913
Dec. 5.

Highway—Dedication—Building Estate—Deposited Plan—Proposed Road and Footpath—Intention—User by Public—Extent of Dedication—Adjoining Owner—Right of Access to Highway.

The defendant in the action (now appellant) laid out and developed his property as a building estate in accordance with a plan approved by the plaintiffs, the local authority. The plan shewed a proposed road bounded on the north by the boundary fence of a park belonging to the plaintiffs, and having, on either side of it, dotted lines indicating intended footpaths forming part of the road, which, in accordance with the by-laws, was of the total width of forty feet. The defendant built houses on the southern side of the road overlooking the plaintiffs' boundary fence and made up and metalled the road for one half of its width next to the houses. The further or northern half of the road next to the plaintiffs' fence was left unmetalled and untouched. The evidence shewed that for some three years before action brought the road, which connected two public highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists, and carts, the metalled part being used in preference to the unmetalled part.

The plaintiffs had recently opened a gate in their boundary fence and were carting building materials across the unmetalled portion of the road and the part intended to be appropriated for a footpath. The defendant objected on the ground that the unmetalled portion was not subject to any public right of way and that, even if it were, the plaintiffs were not entitled to take their carts over the part appropriated solely for the purposes of a footpath.

Joyce J. found as a fact that there had been a dedication of the whole width of the road as a highway and held that the plaintiffs as adjoining owners were entitled at reasonable times and to a reasonable extent to cross on foot or with vehicles the portion of the highway appropriated as a footpath, and the Court of Appeal affirmed his decision :—

Held, as regards dedication, that there was no sufficient ground for disturbing the decisions of the Courts below upon a question of fact,

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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and that the plaintiffs as adjoining owners were entitled to the access which they claimed.

Order of the Court of Appeal [1912] 2 Ch. 633, affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Joyce J. (1)

In 1902 the respondents purchased certain property known as Downhills Park, Tottenham, the southern border of which abutted on to the northern side of adjoining property purchased by the appellant in the same year. In 1903 the respondents erected a fence along the southern boundary of their land, and at that time the land of the appellant to the south thereof was meadow land without any kind of road thereon. There was no means of access from the land of the respondents to the land of the appellant. In February, 1905, the appellant, being desirous of building on his land, deposited with the engineer of the respondents as the local authority a plan for laying out the land as a building estate in accordance with the respondents' by-laws. This plan shewed an intended road starting from a road on the south called Philip Lane and running in a northerly direction for a considerable part of its length and then turning sharply towards the east and running into an existing road called Downhills Park Road. Both Philip Lane and Downhills Park Road were public highways repairable by the inhabitants at large. The part of the intended road running west and east abutted throughout its length on the boundary fence of Downhills Park. The road was to be called Keston Road and was shewn of a width of forty feet in accordance with the requirements of the by-laws.

The deposited plan shewed a proposed footpath seven feet six inches wide on each side of and as portions of the forty-feet road, and such proposed footpath on the northern side abutted throughout its length on the boundary fence of the respondents' property. The building operations of the appellant were commenced on the southern portion of his estate, and by 1909 the part of Keston Road running northwards from Philip Lane had been channelled, kerbed, and paved by the appellant as far as the corner where Keston Road turned eastwards, and the

(1) [1912] 2 Ch. 633.

southern portion of it between Philip Lane and a road called Kirkstall Avenue was taken over by the respondents in 1910 as a highway repairable by the inhabitants at large. Houses were built by the appellant along both sides of the part of Keston Road running north and south during the years 1907 and 1908 and along the southern side of the part of it running east and west in 1908 and 1909. The latter portion of the road was in June, 1909, paved, kerbed, and channelled by the appellant, but only as to the half of its width immediately adjoining the houses erected by him on the southern side thereof. The northern half of this portion of the road where its intended site abutted upon the fence and lands of the respondents was not made up by the appellant, but remained in the same condition as it was at the time he bought it in 1902.

In 1910 the respondents, being desirous of erecting a school on land lying to the west of the appellant's land, applied to the appellant to sell to them a strip of his land near the bend of Keston Road in order that in that way they might obtain an outlet thereto from their school, but the appellant declined to sell any land for any such purpose on the ground that his property would thereby be depreciated in value. In that state of things the respondents, in February, 1912, entered into a contract with a contractor for the building of the schools, and, in order to enable the contractor to cart the necessary materials to the school site, they made temporary gates in their fence separating Downhills Park from the northern side of the eastern part of Keston Road and authorized the contractor to cart the materials from Keston Road through the gates and over a strip of Downhills Park to the school site. The appellant objected, and, after some correspondence, erected a wire fence across the temporary gates. The respondents removed this fence, but it was again erected by the appellant.

Thereupon, on April 22, 1912, the respondents commenced an action against the appellant claiming (inter alia) a declaration that the appellant was not entitled to erect or maintain any obstruction on the public highway known as Keston Road or to impede the respondents from entering on their land from the highway, and an injunction.

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The evidence at the trial shewed that for the preceding two or three years there had been some, though not a very extensive, user by the general public of the eastern portion of Keston Road; that the road had been used as a thoroughfare by pedestrians and cyclists and also by tradesmen's carts, and that although the metalled southern side of the road was used by vehicular traffic in preference to the unmetalled northern side, yet the latter had been used when necessity arose. The appellant had made no attempt to stop such user by the general public.

Joyce J. held that the appellant must be presumed to have intended to dedicate the whole width of the road to the public as a highway for all purposes and that the user by the public had completed such dedication, and he gave judgment for the respondents.

The Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.) affirmed this decision.

Younger, K.C., and *J. Scholefield*, for the appellant. There was here no sufficient user of the unmade part of the road to justify an inference of dedication, and the length of user is unusually short for presuming dedication. Where you find a clear demarcation of user and non-user and no active intention to dedicate, then dedication of the unused part will not be presumed. The fact that this road is unfinished is cogent evidence against the existence of an intention to dedicate. There can be no dedication before completion: *Woodyer* v. *Hadden* (1); *Attorney-General* v. *Biphosphated Guano Co.* (2) There is no presumption of dedication in regard to the unused part where the origin of the highway is known: *Offin* v. *Rochford Rural Council.* (3) There being no evidence of any personal intention to dedicate, the intention must be derived solely from the user; but where there is nothing but user from which dedication can be presumed it is the measure of the user which determines the public right. Here not only is there no

(1) (1813) 5 Taunt. 125, at pp. 135, 140, 142.

(2) (1879) 11 Ch. D. 327, at pp. 338—341.

(3) [1906] 1 Ch. 342, at p. 353.

actual user of the unmetalled part of the road, but the nature of the ground precludes the possibility of user, and, there being no present intention to dedicate, there are no materials from which dedication can be presumed. The fact that the appellant intended at some future time to open up a forty-foot road over which the public should have rights and that he took no steps in the meantime to stop the user of the public is not a sufficient ground for inferring an immediate intention to dedicate: *Kirby* v. *Paignton Urban District Council.* (1) The deposited plans being consistent either with the road being dedicated to the public as a public highway or with it being a private road should be left out of consideration. Assuming dedication of the road and footpath, an adjoining owner has no right of passage over the footway for carts. [Upon this point they referred to *St. Mary's, Newington* v. *Jacobs.* (2)]

Macmorran, K.C., and *Cartwright Sharp*, for the respondents, were not called upon.

LORD DUNEDIN. My Lords, this case depends upon a question of fact and upon a question of fact alone. The circumstances out of which it arises are simple enough. The appellant is a builder, and he got a piece of ground which he proceeded to lay out for building purposes. Under the local statutes which apply to the area in question, before he proceeded with the building he was bound to submit to the local authority a plan shewing how he proposed his streets to go and how the houses were placed on those streets, with various other particulars. He did so, and that plan disclosed that he proposed to erect a set of houses forming what you might call a hollow square and roads forming the outside of the square; and it is with regard to the road which joins the upper or northern side of that square that the question arises. The plan was approved and he proceeded with the building. He built the southern portion first and finished the roads there; and then he came towards the north. In order to get access to the north he threw down some old fences that were there, and he then built the houses on the north. After those houses were built they were let and were occupied on short tenancies—it seems

(1) [1913] 1 Ch. 337. (2) (1871) L. R. 7 Q. B. 47.

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to be a kind of property which is let in weekly tenancies; and since that time, since the houses were fully occupied, it is a fact that all and sundry have been used to pass along this northern portion of what is called Keston Road. The point that is raised is whether the contiguous owners on the other side of Keston Road are or are not entitled to have access to Keston Road as being a public highway; and that depends upon whether there has been dedication.

The four learned judges who have been occupied with the case in the Courts below have all come to the opinion that there was evidence upon which they were led to the conclusion that there had been dedication. I do not doubt your Lordships' right to reverse that decision, nor do I doubt that it is your duty to apply your minds to the evidence; but in a case where there have been concurrent judgments in the Courts below on a matter of fact it is always, in accordance with your practice, necessary that there should be a somewhat clear opinion that the decision come to has been wrong, before you reverse it.

My Lords, I cannot say that I could come to any such clear opinion. The fact is that this road has all along been used by the public. It is quite true that the appellant himself does not say in so many words that he dedicated it, but we have to judge by his acts and not only by his spoken words.

The proposition on the other side I think came to this, that, inasmuch as under the provisions of the local statutes to which I have referred there was a probability that in the future the road would be made up by the contiguous proprietors, and having been so made up would be taken over by the local authority, until that time came it was not fair to suppose that the road would be dedicated. But on the other hand it is equally I think consonant with common sense to suppose that once these houses were built the proprietor was quite content that it should be dedicated to the public. And that is really what the learned judges have decided.

I need only mention two other arguments which were pressed upon us by the learned counsel for the appellant. It is a fact that although the road has been open it has only been made up in a way convenient for wheeled traffic as regards half its

breadth, the half which is immediately ex adverso the houses which have been built; and the learned counsel argued that as this was the case, where dedication was being inferred from user the dedication should not be held to extend to a greater breadth than the user has ordinarily extended to. My Lords, I think that is really in the whole circumstances an impossible proposition. Persons will always, of course, use that part of a road which is in the best condition, and therefore I have no doubt that the actual traffic has gone along the made side of the road. But the rest of the road was open and the plan shews that it was all along in contemplation that this road should eventually be a forty-foot road. Under those circumstances I think it is impossible to suppose that if there was dedication there was not dedication of the whole. To suppose anything else would be to suppose that this man wished to give the public a right to half the road and to keep the other half private to himself.

The other argument, which I think is a still more hopeless one, deals with the fact that in the plans as deposited it is shewn that when the road is properly finished there will be a foot pavement on each side, and it was said that inasmuch as a foot pavement is meant for foot passengers it would be impossible for the contiguous proprietors on each side to come with their carriages over that foot passage. There again I think that if you have a road of this class as to which you come to the conclusion that there is dedication, it is dedication of the whole road subject only to the fact that it is going to be finished in a certain way, and that it is not dedication (a thing which I should think never was heard of in fact) of two parallel strips, one dedicated as a carriage-way and the other dedicated to foot passengers only.

Upon the whole matter, my Lords, I come therefore to the same conclusion as the learned judges in the Court of Appeal, and I move your Lordships that this appeal should be dismissed.

LORD ATKINSON. My Lords, I concur and I have nothing to add.

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LORD PARKER OF WADDINGTON. My Lords, I also concur.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 5, 1913.

Solicitors for appellant: *H. E. & W. Bury.*
Solicitors for respondents: *Howard & Shelton.*

[HOUSE OF LORDS.]

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CABABÉ . . . . . APPELLANT;

AND

WALTON-ON-THAMES URBAN DISTRICT COUNCIL . . . . . RESPONDENTS.

Highway—Repair—Way becoming a Highway after 1835*—Absence of Intentional Dedication by Owner—Whether repairable by Inhabitants at large —Highway Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 23.

Sect. 23 of the Highway Act, 1835, which limits the liability of a parish to repair new highways, applies to highways which have become such as the result of dedication presumed from public user.

A road is "made by and at the expense of an individual or private person, body politic or corporate," within the meaning of the section, if the owner of the soil suffers it to be used as a road long enough for it to become a road in fact, and if any expense there may be has to be at his charge.

Per Earl Loreburn: The section is not confined to a case in which the same person makes the road and spends the money.

At some date between 1835 and 1864 a lane became a public highway, but there was no evidence to shew at what precise date, or how, when, or at whose expense the lane was originally made. The lane was apparently in existence prior to an inclosure award of 1804, made under an Act which provided that all roads not set out in the award

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* *Present:* EARL LOREBURN, LORD KINNEAR (during the argument only), LORD DUNEDIN, and LORD ATKINSON.

should be extinguished, and was included in the lands allotted by the award but was not set out as a road:—

Held, that it was not a highway repairable by the inhabitants at large.

Per Lord Dunedin: *Reg.* v. *Thomas* (1857) 7 E. & B. 399 disapproved, and *Leigh Urban District Council* v. *King* [1901] 1 K. B. 747 doubted.

Decision of the Court of Appeal [1913] 1 K. B. 481, affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court upon a case stated by the Surrey Quarter Sessions. (2)

Acting under the Private Street Works Act, 1892, the respondents passed a resolution approving a provisional apportionment in respect of the sewering, metalling, &c., of about 334 yards of Cottimore Lane, Walton-on-Thames. The estimated cost of the works was 822*l.* 19*s.* 7*d.*, and the appellant as owner of the property known as Walton Grove was treated as liable to be charged in the apportionment for the sum of 425*l.* 18*s.* 9*d.* The appellant objected to the apportionment upon the ground (inter alia) that Cottimore Lane was a highway repairable by the inhabitants at large. The objection was heard before the justices for the petty sessional division of Kingston-on-Thames and was overruled. The appellant appealed to the quarter sessions, who dismissed the appeal subject to the case stated by them for the opinion of the King's Bench Division.

At the hearing of the appeal the following facts were established to the satisfaction of the quarter sessions:—There was a lane branching from the Kingston High Road and open to it and proceeding for a length of about a mile into the highway known as Rydens Road. At the point where it left the Kingston Road the lane was about 32 feet wide and its average width was over 20 feet, it being in no part of a less width than 19 feet 6 inches. The land adjacent to the lane on both sides belonged to various frontagers, the appellant being a frontager on the east side thereof for a distance of about 334 yards starting from the Kingston Road. The land abutting on to the lane on the west side opposite to the appellant's property was bounded by a hedge and ditch. It was admitted by the respondents that the lane

(1) [1913] 1 K. B. 481. (2) [1912] 2 K. B. 432.

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now was and had been since the year 1864 a highway used both by foot passengers and vehicles, but, save as hereafter may appear, there was no evidence to shew how, when, or under what circumstances and at whose expense the lane was originally made or laid down.

The site of the road and adjoining lands on the south-west side thereof formerly consisted of common lands, and by the Walton Inclosure Act, 1800 (39 & 40 Geo. 3, c. lxxxvi.), these lands were directed to be enclosed. The Act empowered and required the commissioners appointed thereunder to set out and appoint such public and private roads and ways as they should think requisite, and by s. 22 it was enacted that after such public and private roads and ways should have been set out and made it should not be lawful for any person or persons to use any of the roads or ways, either public or private, over, through, or upon any of the lands and grounds by the award intended to be divided and enclosed either on foot or with horses, carts, or carriages, but that all roads and ways over, through, and upon any such lands and grounds which should not be set out and appointed as aforesaid should be and the same were thereby declared to be for ever stopped and extinguished and should be deemed and taken as part of the lands and grounds by the said Act directed to be divided, allotted, and enclosed and should be divided, allotted, and enclosed accordingly. The justices found that the road in question was not set out or appointed as a highway and hat if there ever had been any highway thereon it was stopped up nd extinguished by virtue of the said provisions and the award.

By an inclosure award made under the Inclosure Act of 1800 and dated December 18, 1804, there was allotted to the appellant's predecessor in title, one Thomas Blair, under the allotment No. 726a "All that allotment or parcel of common field land being part of an ancient lane leading from the Kingston Road into a certain common field called Church Field containing 8 perche bounded on the north-west by the Kingston Road on the south-west by the allotment of the said Edward Peppin and on the north-east by the old inclosures of the said Thomas Blair," and it was also awarded that the owner of this allotment should make all the fences thereof.

There was also allotted to the appellant's predecessor in title under the allotment No. 727 all that triangular piece or parcel of common field land No. 727 situate adjoining the south side of this old inclosure called Walton Grove, containing 1 acre 37 perches, bounded on the north and east by old inclosures of the said Thomas Blair and on the south by an allotment of the said Edward Peppin, and it was awarded that the owner of this allotment should make the fences on the south side thereof.

There was also allotted and awarded to Edward Peppin under No. 726 "All that allotment or parcel of the aforesaid common field land situate in Church Field containing 52 acres bounded on the north-east by the old inclosure of the said Thomas Blair (being the inclosure above referred to) on the south-east by the inclosure of the said Edward Peppin on the south-west by the inclosure of the said Richard North on the north-west by the Kingston Road," and it was further awarded that the owner of this allotment should make the fences on the south-west, south-east, and north-west sides thereof.

There was also allotted and awarded to the said Edward Peppin under No. 751 "All that allotment or parcel of waste land situate in the Lower Common and containing 56 acres 3 roods and 20 perches bounded on the north-west by old inclosures of the said Edward Peppin and a road on the south-west by an allotment of Richard North on the south-east by an allotment of Jeremiah Hodges and the tithe allotment and on the north-east by the allotment of His Majesty King George III. and Mrs. Fowke subject to a bridleway and footpath through part of the allotment leading into Church Field and under the north-east side thereof into the Kingston Road to and for the use of the occupiers for ever of a farm belonging to His Majesty King George III. situate in the Lower Common in the occupation of the said Edward Peppin his lessee." The ancient lane above referred to and the bridleway and footpath occupied the site of what was now known as Cottimore Lane. They were indicated by dotted lines on the map annexed to the award.

By a conveyance dated November 28, 1826, George Daniel MacIntosh and Edwin Peppin, the vendors of the land over which this bridle path and footway ran, sold part of the land

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comprising (inter alia) the lands allotted to Peppin by the award under No. 726 to Charlotte Smoult, but reserved over the site of the bridleway a right of way for themselves, servants, and others with and without horses, cattle, or other animals, carts, and other carriages to pass and repass at all times for ever thereafter, and by a conveyance dated July 9, 1836, Charlotte Smoult sold the land to one Spicer and reserved a right of way over the said road for all purposes in similar terms.

In the year 1864 all the land mentioned in the previous conveyances was acquired by one Alderman Sidney and he proceeded to develop a large portion thereof as a building estate. He opened up a new road from Rydens Road which joined the private road in question at or near the house known as Cottimore and another new road at right angles thereto which ran in a south-westerly direction into a public highway known as Esher Road.

The only houses in the lane until within recent years were the houses known as Cottimore, Fishmore Farm, and Crown Farm, and the road was from time to time well and substantially made up and kept in sufficient repair by the owners and occupiers of the lands belonging to such houses and farms at their own expense and in more recent years by the owners of dwelling-houses built in the lane.

No public money had ever been expended in the making or repairing of the road, and there was no evidence that it was ever repaired by the inhabitants at large or by the respondents or their predecessors.

At the conclusion of the council's case, it was submitted on behalf of the appellant that the lane being now admittedly a highway it was at common law repairable by the inhabitants at large, and *Rex* v. *Leake* (1) was cited, and that the respondents had failed to adduce any evidence bringing the case within s. 23 of the Highway Act, 1835 (2), citing *Reg.* v.

(1) (1833) 5 B. & Ad. 469.

(2) The Public Highway Act, 1835, s. 23: "No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure

Thomas (1) and *Healey* v. *Batley Corporation.* (2) For the respondents it was contended that *Reg.* v. *Thomas* (1) had no application, as that was the case of a turnpike road and so subject to special statutory provisions, and that s. 23 of the Highway Act protected the respondents. The justices took this view and overruled the submission of the appellant before counsel for the respondents had concluded his argument. Upon behalf of the appellant evidence was then adduced of old inhabitants shewing that the lane had been used by the public since the year 1840 as a thoroughfare between the Kingston Road and Rydens Road for both foot passengers and vehicular traffic, but this was disputed on behalf of the respondents. The lane also appeared upon three maps of Surrey, one by Rocque dated 1765, one by Carey dated 1785, and one by Greenwood dated 1823. There were also other maps of about the same date in which it was admitted that the lane was not shewn.

It was further contended on behalf of the appellant that the proper legal presumption was that the lane was a highway before 1835 or that if it became so since then it had been formally dedicated, and the case of *Paris* v. *Lymington Urban District Council,* decided by Joyce J. and reported in *The*

Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate, in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate . . . ."

(1) 7 E. & B. 399.

(2) (1875) L. R. 19 Eq. 375.

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Times of February 11, 1911, was cited, and *Leigh Urban District Council* v. *King*. (1)

The justices overruled both these contentions. They found as facts upon the evidence that the road was not a public highway in 1835, and that although to-day it might be a public highway it was not repairable by the district council, i.e., by the inhabitants at large.

The questions stated for the opinion of the Court were: (1.) Whether on the facts found by the justices the respondents were entitled to rely upon s. 23 of the Highway Act, 1835. (2.) Whether the justices were right upon the evidence before them in finding that the road was not a highway repairable by the inhabitants at large.

The decision of the justices was affirmed, first, by the Divisional Court (Lord Alverstone C.J., Pickford and Avory JJ.), and afterwards by the Court of Appeal (Cozens-Hardy M.R., Farwell and Hamilton L.JJ.).

1913. Nov. 11, 12. *Sir R. Finlay, K.C.*, and *Michael Cababé*, for the appellant. The question whether this road is a public highway repairable by the inhabitants at large depends upon two questions—(1.) whether it was a public highway before the Highway Act, 1835, and (2.) whether, if not, this was a road to which s. 23 of the Highway Act applied. As to 1, the proper inference to be drawn from the evidence is that this road was dedicated to the public after 1804 and before 1835. An admitted public user for fifty years, even if the case rested upon that alone, is sufficient to support an inference that the dedication was at the earliest date at which there was no interruption, i.e., immediately after the inclosure award of 1804, and the justices ought to have so found. The public took no notice of the legal extinction of the lane by virtue of the Inclosure Act; the physical facts of the case were too strong for the commissioners. The finding of the justices that this road was not a highway in 1835 was unduly influenced by the reservation of the private rights of way in the conveyances of 1826 and 1836. That, however, does not conclude the question. If the Court of

(1) [1901] 1 K. B. 747.

Quarter Sessions drew a wrong inference of fact, that is not binding on the appellate Court, and it is open to the House to draw the proper inference: Supreme Court of Judicature (Procedure) Act, 1894, s. 2, sub-ss. 1 and 2.

As to 2, the onus is on the respondents to prove that this road falls within s. 23 of the Highway Act, 1835, and that onus they have failed to discharge: *Attorney-General* v. *Watford Rural District Council*. (1) The section applies, first, to a road which has been made by and at the expense of the owner and which he proposes to dedicate after the passing of the Act, and, secondly to a road set out as a private driftway or horsepath in an inclosure award. Here there is no evidence to shew under what circumstances or at whose expense the road was originally made or whether any money was ever expended in making the road. The mischief which the section was intended to prevent was the dedication of a road to the public by a speculative builder with the result of throwing upon the parish the burden of repairing it. The section has no application to a dedication presumed from public user and its language is inappropriate for that purpose: *Reg.* v. *Thomas* (2); *Healey* v. *Batley Corporation* (3); *Leigh Urban District Council* v. *King*. (4) Where the right has been acquired by public user against the will of the owner it cannot have been the intention of the Legislature to render him liable for the repair of the highway merely because he has not taken sufficient care to exclude the public. The whole machinery of the section is opposed to that construction. Then it is suggested by Pickford J. and Hamilton L.J. that this road was a driftway or horsepath set out in the award of 1804, but the justices have found the contrary. Assuming that the section applies, having regard to the length of user, it must be assumed that the formalities required by the section have been complied with. [They also referred to *Rex* v. *Paddington Vestry*. (5)]

Sankey, K.C., and *William Mackenzie*, for the respondents. 1. The justices have found as a fact upon the evidence that this

(1) [1912] 1 Ch. 417, at p. 433.
(2) 7 E. & B. 399, at pp. 406, 408.
(3) L. R. 19 Eq. 375, at p. 393.
(4) [1901] 1 K. B. 747, at p. 752.
(5) (1829) 9 B. & C. 456.

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road was not a public highway in 1835, and having regard to the provisions of the deeds of 1826 and 1836 reserving a private right of way over the locus in quo, which even if inserted ex abundanti cautela at least suggest a doubt as to the public right at those dates, to the fact that no repairs were done by the inhabitants at large, and to the fact that the road was repaired by the adjoining owners, they were justified in that finding. There was some slight evidence of user up to 1840, but the justices were the proper persons to determine the weight and quality of that evidence and they considered it insufficient. Just as it is possible to get a punctum temporis in cases of express dedication so it is possible to get a punctum temporis in cases of implied dedication, though it is more difficult of proof. The respondents admitted that the road was a public highway in 1864 by reason of the acts of Alderman Sidney in laying out the estate and constructing new roads, and they took the view, which was adopted by the Court of Appeal, that that date was the commencement of the public right. Assuming that the justices were not justified in their finding the case should be remitted to them to restate the facts.

2. If this road was not a highway in 1835, s. 23 of the Highway Act, 1835, applies, either because this was a driftway or horse-path set out by the award or because it was a road made by or at the expense of a private person or corporation in respect of which the proper proceedings had not been taken to make it repairable by the inhabitants at large. It is submitted that the allotment to Peppin subject to the bridleway for the use of the occupiers of the Crown Farm, coupled with the marking of the bridleway by dotted lines on the map attached to the award, constitutes a setting out within the section. But, assuming that the respondents are wrong on this point, this road falls within the other part of the section. There are two classes of public highways—those created by express dedication and those created by implied dedication. That difference, however, does not alter the character of the highway, but only affects the mode of proof. When once the road has become a public highway the statute applies, whether dedication is express or implied. In s. 23 "made" is not equivalent to made up; a way may be made by the constant user of the public; and "expense" does not

necessarily involve the expenditure of money. As Hamilton L.J. puts it, "Where an owner's exclusive right to the enjoyment of the surface is subjected to a perpetual right of passage in favour of the public, that right is acquired at the expense of the servient owner." [They referred to *Eyre* v. *New Forest Highway Board* (1) and *Fenwick* v. *Croydon Rural Sanitary Authority.* (2)] *Reg.* v. *Thomas* (3), unless it can be supported upon its special facts, was wrongly decided and ought to be overruled. The observations of Coleridge and Wightman JJ. upon the construction of the Act are obviously too wide, and the same remark applies to the observations of Bacon V.-C. in *Healey* v. *Batley Corporation* (4)—observations which were obiter only.

Sir R. Finlay, K.C., replied.

The House took time for consideration.

1913. Dec. 12. Earl Loreburn. My Lords, this is an appeal from an order of the Court of Appeal affirming an order of the King's Bench Division which upheld a decision subject to a special case of the Surrey Quarter Sessions.

It is common ground that Cottimore Lane has been a highway since 1864, but quarter sessions found that it was not a highway in 1835 and two other Courts have agreed with them in this view. Now there was evidence the other way, for admittedly this lane had been a highway since 1864, and that circumstance standing alone points to the conclusion that it had been a highway at a long antecedent date. Upon the other hand the lane had never been, in fact, repaired by the inhabitants, and if it was a public highway in 1835 it would have been repairable by them. That looks as if it was not a highway in 1835. There was also some evidence going back to 1840. Beyond question the evidence disclosed a conflict of probabilities, and three Courts in succession have taken the same view of it. This House has always required to be quite clearly satisfied before differing from such a weight of opinion upon a question which largely depends upon evidence or upon admissions in the place of evidence. I am not prepared to take a different view from the Courts below. I take it, therefore,

(1) 56 J. P. 517.
(2) [1891] 2 Q. B. 216.
(3) 7 E. & B. 399.
(4) L. R. 19 Eq. 375.

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that this road became a highway at some date after the Highway Act of 1835 came into operation.

That being the date of Cottimore Lane becoming a highway, was it repairable by the inhabitants at large? It would have become so when, by dedication, it became a highway had it not been for s. 23 of the Highway Act, 1835. But in my opinion the effect of that section was to prevent that result. It was the object of that enactment to prevent people from imposing upon the inhabitants a duty to repair a road which might not be necessary. This section must be construed as it stands. Its first limb contains a prohibition. "No road . . . . made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate . . . . shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair unless" some conditions are fulfilled. Now, admittedly, these conditions were not fulfilled in this case. Accordingly the question is whether this road was "made by and at the expense of any individual or private person, body politic or corporate." I think it was. The owners of the soil allowed it to be used as a road. They caused a road to exist. Other private individuals, namely, to put it shortly, the adjoining occupiers, for their own convenience, spent money in repairing it, whereas the inhabitants at large spent none. In this way this road came into existence by the act or permission of private individuals, and also at the actual expense of private individuals, even though those who permitted and those who spent money may have been different persons.

It was argued that s. 23 refers only to cases in which the same person or persons made the road and spent the money, as occurs when a man lays out his property for building. Probably this was the class prominently in view when the section was drafted. But the words invite, and ought to receive, a wider construction. Otherwise the landowner might dedicate and the builder might construct the road, and between them they could impose upon the inhabitants the duty of repairing an unnecessary highway, which is just the thing that s. 23 is intended to avoid.

For the same reason I repel the argument that this section applies only when some persons "made" the road in the sense

of physically constructing it. A man may make a road by allowing the land to be so used until the track and the user of it becomes sufficiently definite to answer the description of a road in common parlance. It does not matter whether it is a highway or not. The section speaks of making a road.

I desire to add, though it is not necessary for this case, that when the section speaks of a road being made by and at the expense of an individual, I doubt if it is necessary to prove that individuals actually spent money upon it. The contrast is between roads made at the expense of the inhabitants and roads made at the expense of individuals, whether corporate or not. The use of the word "expense" does, no doubt, import the spending of money or its equivalent, but a thing is done at a man's expense when any expense there may be has to be defrayed by him. For example, if a man contracts to procure information at his own expense, it does not mean that he is bound to spend money in procuring it: perhaps he can procure it gratuitously. It means that he is to defray whatever expense is necessary.

I think that the landowners in this case made the road by suffering their land to be so used long enough to become a road in fact, whether a highway or not, and that they or other individuals spent money on it, though it might be enough to say that whatever expense was required had to be at the charge of individuals.

It follows that this road comes within s. 23 of the Highway Act, 1835. It was not a highway repairable by the inhabitants prior to 1835. It became a highway in 1864, and perhaps at an earlier date, but after the Highway Act came into operation. Accordingly s. 23 of that Act prevented its becoming repairable by the inhabitants because it was a road made by and at the expense of individuals and none of the requirements of s. 23 were complied with. It may be a hard case upon the appellant. I am afraid the law is against her.

I move your Lordships to dismiss this appeal.

LORD DUNEDIN. My Lords, there are two questions involved in this appeal. The first is one of pure fact. Was this lane dedicated to the public as a highway prior to 1835?

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Now, it is known that it could not be so dedicated till after 1804, because the effect of the Inclosure Act of 1800 was to wipe out all rights of way existing prior to the division of the common under the said Act, save only such as are set out in the award of the commissioners, which award is of date 1804. On the other hand, it was admitted that since 1864 it has been used as a highway. The case began by an order being made by two of the justices, against which order an appeal was taken to quarter sessions.

The justices in quarter sessions held an inquiry, at which witnesses were examined and plans produced. As a result of that inquiry they found that the lane was not a public highway in 1835. A case was asked and stated. In this case there were set forth various specific matters which the justices held established in the evidence.

The case was heard before the Divisional Court, who affirmed the decision of the justices in quarter sessions. Against that judgment an appeal was taken to the Court of Appeal, who unanimously affirmed the judgment. The result is that on a pure question of fact there has been an unanimous finding by the justices in quarter sessions and by no less than six judges.

Now it is quite true that an appeal from quarter sessions is in a different position from an appeal taken directly from the justices to the High Court. In that case points of law (including, of course, the submission that the finding in fact has no evidence to support it) alone are open. In this case the Divisional Court has the right and duty to draw inferences of fact from the facts stated, and that right and duty passes to each appellate Court in turn. None the less, however, in any questions of pure fact where there have been concurrently unanimous judgments of a succession of lower Courts, your Lordships in this House have often indicated that you must be clearly convinced that the judgment is wrong in order to reverse it. I cannot say here that I have come to any such clear conclusion. On the one hand, there is the natural assumption that, a user pointing to dedication being admitted as effective since 1864, and there being some evidence at least of antecedent user, the user and inferred dedication must be drawn back to quite early times. On the

other hand, there is the fact of no repairs having been done by the parish, while repairs were done by private parties, and there is the synchronization of the admitted public right in 1864 with a general opening up of the locus in quo by the construction of Alderman Sidney's roads. In this divided state of the evidence the judgments are as I have stated. I do not think it would be in accordance with your Lordships' practice if in such a state of evidence you reversed them.

The second question arises upon the true construction of s. 23 of the Highway Act, 1835. It having been determined that this lane or road was not dedicated as a highway before 1835, but was dedicated by at least 1864, the question is, does s. 23 apply? If it does, then there is no evidence of the carrying out of the formalities necessary to saddle the parish with the duty of repair, the road is not a highway repairable by the inhabitants at large, and the original order of the justices must stand. The appellant, however, argues that the section does not apply to a road such as this because it is neither, says she, made by and at the expense of any individual or private person, body politic or corporate, nor is it set out in any award of commissioners under an Inclosure Act.

Some of the learned judges held that this road was "set out" in the award of 1804, because in the allotment of one portion, the portion allotted is subjected to a right of passage in favour of a particular farm along a line which obviously coincides with the lane. But the provisions of s. 21 of the Inclosure Act of 1800 point to a very different sort of proceeding, and when in the body of the award we find that there are several private and public roads set out with appropriate formality of which this is not one, I think the matter is made clear. I could not therefore agree with this special ground of judgment.

Let me now turn to s. 23 of the Highway Act as a whole. All are agreed as to the mischief which it was intended to remedy. At common law if a proprietor chooses to dedicate a highway the parish ipso facto comes under the burden of its repair. The road may be really useful to the proprietor only as the inception of a building scheme. It may be a white elephant to the parish, but the parish is helpless. Once let the proprietor dedicate,

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the burden of repair is irrevocably cast upon the inhabitants. Now the general scheme of s. 23 was to bring this state of affairs to an end, to allow dedication, but to avoid the automatic consequence, and to provide that the parish should have a power of refusal. It is impossible to read the section as a whole without seeing, first, that it is dealing with the future, and, secondly, that its phraseology is influenced by the consideration of the mischief of the past.

In accordance with this general view there are many judicial expressions of opinion. Probably it is enough to cite one—the sentence from the judgment of Lord Blackburn in *Reg.* v. *Inhabitants of Dukinfield* (1), quoted by Farwell L.J. in this case: "Then came the Highway Act; and now a road cannot become a highway [repairable by the parish] unless certain things are done." Now there is no exception from the generality of this language, but in spite of the high authority of the learned Lord and the accuracy of the language he generally uses, I do not propose to treat this dictum as absolute authority because, first, I do not think the point urged here was argued in that or the other cases where similar general statements are to be found, and, secondly, because there is contrary authority in the case of *Reg.* v. *Thomas.* (2)

The first observation I would make is that the section requires some construction. No one can suppose that it was intended to free the parishes from a burden already upon them in regard to existing roads. Yet, inasmuch as the expression is "made or to be made," the result, if the section was read absolutely literally, would be that a road made by a proprietor many years before and dedicated expressly, and which ever since had been repaired by the parish, would no longer be "deemed to be repairable," the methods provided for saddling the parish with the burden being in terms inapplicable to any case where there was past dedication. Therefore in order to make the section intelligible you must practically read in after "Inclosure Act" in the first sentence some such words as "which have not at the date of this Act been already dedicated to the public as highways." Such a gloss is absolutely necessary in the interests of the proprietors.

(1) (1863) 32 L. J. (M. C.) 230, at p. 235. (2) 7 E. & B. 399.

Is there, then, any incompatibility in the words actually used with what I have indicated as the accepted general scheme of the section? The appellant argues that one class of road is studiedly not included, namely, the road which is, so to speak, created by sufferance. Now, as I have already said, I have no doubt the form of words used was influenced by the mischief to be prevented, and has consequently been so expressed as to point most clearly to what I may call the opera manufacta of proprietors. But it is, I think, no straining of the words to say that if a proprietor permits the public to use a passage, and the user of that passage is held, on inquiry, to be sufficient evidence of dedication, then it is the permitting proprietor who has really "made" the road, and the expression "at the expense of" must be glossed by the addition of the words "if any expense there be." This is no more violent than the gloss which has already been put on the section, and it carries out what I think all must admit to be the general scheme of the section. I am aware that a more figurative interpretation of "at the expense of" has been suggested. I am not myself able to adopt that, in view of the obvious meaning of the same word in two other places in the same section.

On the whole matter I am therefore of opinion that this road does fall within the section. It was really not contended that, if that is so, the formalities had in this case ever been observed. But I wish, as to this, to say that I thoroughly agree with the dictum of Hamilton L.J., that this is not the sort of case to which the brocard omnia præsumuntur rite et solenniter acta has any application. I do not say that there might not be a case where, if, for instance, the lapse of time was long, and the parish had all along repaired the road, the mere absence of direct proof of the formalities might be held not to be fatal. But each case must be judged of on its own circumstances, and I have, to say the least of it, grave doubts as to whether the case of *Leigh Urban District Council* v. *King* (1) was rightly decided.

In conclusion, I ought to say one word as to *Reg.* v. *Thomas*. (2) The circumstances in that case were very peculiar, and are exceedingly unlikely ever to occur in another case. If the case

(1) [1901] 1 K. B. 747. (2) 7 E. & B. 399.

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can be rested on the speciality of the circumstances it may stand. I do not think that, fairly read, it can be so rested. I therefore say that I do not agree with it, in which opinion I am at one with the learned Lords Justices in the present case.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 12, 1913.

Solicitors for appellant: *J. Westcott & Sons.*
Solicitor for respondents: *Percy H. Webb.*

[HOUSE OF LORDS.]

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METROPOLITAN WATER BOARD . . . . APPELLANTS;

AND

AVERY . . . . . RESPONDENT.

Water—Supply—London—Charges—Domestic Purposes—Trade Purposes—Public-house—Catering Business—Water used for the Preparation of Luncheons—Metropolitan Water Board (Charges) Act, 1907 (*7 Edw. 7, c. clxxi.*), *ss.* 8, 25.

Water supplied under the Metropolitan Water Board (Charges) Act, 1907, to the licensee of a public-house where luncheons were served was used for cooking the food and washing up the plates and dishes:—

Held, that the water was used for domestic purposes within the meaning of s. 25 of the Act and must be charged for on that footing.

Decision of the Court of Appeal [1914] 1 K. B. 221, affirmed.

Per Lord Dunedin: The statement of Buckley L.J. that "the test" of domestic purposes "is not whether the water is consumed or used in the course of the trade but whether the user of the water is in its nature domestic" approved.

APPEAL from an order of the Court of Appeal (1) affirming an order of a Divisional Court which reversed a judgment of the Westminster County Court judge. (2)

* *Present:* EARL OF HALSBURY, LORD DUNEDIN, and LORD ATKINSON. LORD KINNEAR was present during the argument only.

1) [1914] 1 K. B. 221. (2) [1913] 2 K. B. 257.

The respondent was the occupier and licensee of a public-house known as the Crutched Friars, No. 1, John Street, Minories. Under s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), she obtained from the appellants a supply of water for domestic purposes and paid to them water rates at the ordinary rate of 5 per cent. on the value of the premises. The respondent, besides supplying liquor, served between twenty and thirty luncheons daily upon the premises, and this service involved an additional use of water, beyond what would be used in an ordinary public-house, for cooking, washing dishes, plates, &c., and for scrubbing floors.

The appellants sought to impose upon the respondent an additional charge of 2*s.* 6*d.* per quarter in respect of the supply of water used in connection with the serving of luncheons, and they commenced an action against the respondent in the Westminster Court to recover the sum of 5*s.* in respect of water supplied to the respondent for the purposes of her catering business.

The substantial question between the parties was whether the water used for this business was a supply of water for domestic purposes or for the purposes of a trade or business within the meaning of the Metropolitan Water Board (Charges) Act, 1907. (1) The county court judge held that it was a supply for

(1) Metropolitan Water Board (Charges) Act, 1907, s. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include waterclosets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely):—

"Steam gas motor and other like engines;

"Railway purposes;

"Ventilating purposes;

"Working any machine or apparatus;

"Consumption by or washing of horses or cattle;

"Washing carriages or other vehicles;

"Watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus;

"Fountains or any ornamental purpose;

"Cleansing sewers and drains;

"Cleansing and watering streets or roads;

"Fire extinction;

"Flushing drains by means of any apparatus discharging automatically;

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the purposes of a trade or business and gave judgment for the appellants for the amount claimed.

The Divisional Court (Channell and Bray JJ.) reversed the decision of the county court judge and held that the water was used for domestic purposes, and the decision of the Divisional Court was affirmed by the Court of Appeal (Vaughan Williams, Buckley, and Hamilton L.JJ.).

1913. Nov. 14. *Sir R. Finlay, K.C.*, and *Clavell Salter, K.C.* (with them *J. Goodland*), for the appellants. Although water may be used for domestic purposes, colloquially speaking, yet, if it is used for the purpose of a trade or business, it is not used for domestic purposes within s. 25 of the Metropolitan Water Board (Charges) Act, 1907. That section expressly excludes from domestic purposes, among other things, the purpose of any trade or business. Many of the enumerated exceptions are inserted irrespective of the colloquial use of the term "domestic purposes" and are purely arbitrary. If water is supplied to a trader to enable him to earn the reward of his trade it is used for trade purposes. The additional water required for cooking the food in connection with this catering business and for cleansing the plates and dishes on which the food is served is water used for the purpose of that trade or business. It is not a mere ancillary use. To adopt Lord Loreburn's language in *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1), this is a "supply for use in the trade, manufacture, or business." The decision in that case was that the water was supplied for domestic purposes because it was a supply for the mere personal convenience of the men employed in the factory. Sect. 25 in a clumsy and inartificial way points to the conclusion that a supply of water for domestic purposes is really confined to a supply for the personal convenience of the inmates of the house to which the water is supplied whether they sleep there or are there for

"Public pumps baths or washhouses;

"Any trade manufacture or business;

"Any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

(1) [1912] A. C. 24, at p. 31.

the working day. Thus baths of certain dimensions and water closets erected as adjuncts to a house are, to use the slovenly and inaccurate language of the Act, included in domestic purposes, but if erected for the purpose of being let out on hire they would not be so included. Therefore Buckley L.J.'s test that you must consider the character of the purpose for which the water is used and not the character of the premises in which it is used or the character of the persons using it is fallacious and misleading, for according to that test public baths and water closets would be domestic purposes. The first part of the section is not a definition of domestic purposes, and the purposes enumerated in the subsequent clauses of the section are not exceptions from domestic purposes, but are illustrations of what for the purposes of the section domestic purposes shall not include. Nothing could be more domestic than washing clothes, but washing clothes for people in general—people outside the house—would not be a domestic purpose within the section because a trade purpose. So here the increased demand for water for the supply of luncheons is not for a domestic purpose, but for the purpose of the business of a restaurant. The words of s. 25 "any trade, manufacture, or business" do not import that the trade or business must be ejusdem generis with "manufacture." This is illustrated by s. 9, where the words are "trade or business," and by s. 20, where the language is again slightly varied. *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1), the boarding-house case, is distinguishable on the ground that the supply was to the inmates of the house. In *Smith* v. *Müller* (2) a boiler used for heating an office in which the owner did not reside was properly held to be used for domestic purposes. In *Barnard Castle Urban District Council* v. *Wilson* (3) water supplied to a swimming bath for the use of a charity school was held not a supply for domestic purposes. In *South-West Suburban Water Co.* v. *St. Marylebone Union* (4) it was held that a school was a dwelling-house and might be entitled to a domestic supply, and in *Frederick* v. *Bognor Water Co.* (5) water used for the ordinary domestic

(1) [1902] 1 K. B. 310.
(2) [1894] 1 Q. B. 192.
(3) [1902] 2 Ch. 746.
(4) [1904] 2 K. B. 174.
(5) [1909] 1 Ch. 149.

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purposes of the inmates of a school was held to be a supply for domestic purposes. Both those cases are distinguishable upon the ground above stated. Again, in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) water supplied for the sanitary convenience of the workmen employed at the plaintiffs' gas-works was held a domestic supply. In *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2) water supplied for water closets for passengers and for the staff at a railway station was held a supply for railway purposes. It may be doubted whether that decision is consistent with *Colley's Patents, Ld.* v. *Metropolitan Water Board* (3), but it does not affect the present case. On the admitted facts and upon the construction of s. 25 the supply of water in this case is a supply for trade purposes. The water is not supplied for the use of the inmates of the house and it is directly used in the trade or business.

Walter Ryde, K.C., and *E. M. Konstam*, for the respondent, were not called upon.

The House took time for consideration.

Dec. 12. EARL OF HALSBURY. My Lords, this case turns upon the construction to be given to the 25th section of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.).

By the section it is enacted that the expression "domestic purposes" shall be deemed to include water closets and baths within certain capacities, and then proceeds to exclude from that expression a large number of categories, among which are to be found "any trade, manufacture, or business." If each of these words is to be taken as establishing a distinct category, that clause is unskilfully drawn, and indeed its main purpose is apparently not so much to define what are domestic purposes as to enact what shall not be deemed to be domestic purposes, and the result of giving the meaning to the phraseology of the defining section which is sought to be given to it in this case

(1) [1909] 2 Ch. 666. (2) [1910] 2 K. B. 890.
(3) [1912] A. C. 24.

would be to enact what it is, I think, absolutely certain that the Legislature never intended. I think *Colley's Case* (1) is decisive of this case if one looks at the meaning of Lord Loreburn's judgment; also Channell J.'s judgment in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) very clearly points out the mode in which the increased consumption of the water is intended by the Legislature to be paid for when used for domestic purposes.

My Lords, I cannot help adding that I think no ordinary person would have misunderstood the meaning of what was intended to be enacted but for the defining section, which, as I have said, is not a defining section at all.

LORD DUNEDIN. My Lords, the question in this case is whether the water which is used by the occupier of a public-house in preparing luncheons for customers, and in washing plates and dishes, is water used for domestic purposes. The two judges of the Divisional Court and the three judges of the Court of Appeal have unanimously held that it was. With that judgment I agree. The point depends upon the construction to be put on the words "domestic purposes" as used in the Metropolitan Water Board (Charges) Act, 1907, and the argument has ranged round the expression used in s. 25 of that statute.

Now, it is first of all to be noticed that s. 25 is not in the true sense of the word a definition section. It is not only that, as Lord Loreburn L.C. said in *Colley's Case* (1), it is couched in slovenly and inaccurate language, but it does not even profess exhaustively to define. It begins by taking "domestic purposes" as a known expression; it then goes on to say that it shall be "deemed to include" two specific uses, and then it proceeds to give an enumeration of certain uses it is not to include—not an exhaustive definition, but a series of warning notes, so to speak, against an undue inflation of the term "domestic purposes." The particular warning note that is here appealed to by the appellant is the expression [supply for] "any trade, manufacture, or business."

Now what is the criterion which enables us to fix whether the

(1) [1912] A. C. 24. (2) [1902] 1 K. B. 310.

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water is supplied for a trade, manufacture, or business? It does not settle it to point out that a trade, &c., is carried on in the premises where the water is supplied. That is absolutely clear from the terms of s. 9, which contemplates a supply of water for domestic purposes being furnished to a building where not only a trade is carried on, but where the occupation is solely for the purposes of the trade, i.e., not residential at all, and *Colley's Case* (1) in this House is a direct authority. Nor will it do to say that the persons who use it on the premises only go there for the purposes of a trade being carried on. *Pidgeon's Case* (2) (the boarding-house case) is an authority against that. It seems to me that there are just two alternative views left. Either the criterion is to see whether the purpose in connection with the trade is domestic or non-domestic in itself, the criterion adopted by the Courts below and very clearly expressed in the judgments of Bray J. and Buckley L.J., or to say, as the appellants contend, that every use of water, however domestic in its nature, that appears as a step, however insignificant, in a trade operation is use of water for a trade and therefore non-domestic.

The great objection to this latter view is that it goes so far and leads to such astounding results as to make it flagrantly in conflict with what I venture to call the common-sense view of the Act. The appellants themselves seem to have felt this, inasmuch as they admit that they are not in use to exact from public-houses anything more than a domestic rate. Yet unless all liquors are consumed neat and the glasses and mugs never washed, it is clear that the water used in public-houses is, according to their method of definition, a trade use. Nor does the matter stop here. Not only does all water in hotels and boarding-houses for the cooking of provisions (a severe narrowing down of *Pidgeon's Case* (2)) follow the same fate, but no retail shopkeeper could use a damp sponge to clean dusty goods without becoming liable to a trade rate for the water so used.

On the other hand, the test of the quality of the use in itself—so tersely put by Buckley L.J., "The test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic"—is not only

(1) [1912] A. C. 24. (2) [1902] 1 K. B. 310.

easy of application but is automatic in checking abuse. For purposes truly domestic cannot be amplified, and when the consumption on such heads is large it is invariably attended by an increase in the rating value of the premises which brings with it an increased water rate.

The only seeming puzzle is introduced by the illustrations, to which Sir Robert Finlay clung hard in his interesting argument —an establishment of public baths, or public water closets, carried on for a profit. The use of a bath or of a water closet is, says he, in its nature a domestic purpose, and therefore the test of domestic purposes by nature breaks down.

My Lords, I think such extreme cases—for such establishments, at least of the second class, are not common—may be left to be dealt with till they arise within the metropolitan area. But when they do I think the solution may be suggested by a phrase in the judgment of Bray J. He says: "If the water is used for a purpose which is common to all domestic establishments it is none the less used for domestic purposes because it is ancillary to a trade, manufacture, or business." In the case supposed the use of the water would not be ancillary to the business, it would be the business itself, and I should personally be prepared to hold—again, I venture to think, taking a common-sense view of the situation—that the trade use of the water was so pre-eminent that it could not be said that in those establishments there was truly a use for a domestic purpose at all.

I think the appeal should be dismissed. I concede that the case is not covered by the actual judgment in the case of *Colley* (1) in this House; but I believe the views I have expressed are in entire concordance with the spirit of that judgment.

Lord Atkinson. My Lords, in this case the county court judge came to the conclusion that this catering business involved the use of a considerable quantity of water in excess of what would be used if the respondent had not carried on that business, that she could not carry it on without using this extra quantity of water, and held that the water was being used for the purposes

(1) [1912] A. C. 24.

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of a trade or business, as distinguished from domestic purposes, within the meaning of this section.

This was the substantial question raised. Subsidiary questions were also raised, but have not yet been discussed on this appeal. The substantial question is obviously of vast importance.

The matter for decision is the construction of the 25th section of the statute already mentioned, and ultimately, I think, the meaning of the words "any trade, manufacture, or business" used in it.

The Master of the Rolls, in speaking of this section in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1), says that "a more confusing section can scarcely be imagined." And Lord Loreburn, in the case of *Colley's Patents, Ld.* v. *Metropolitan Water Board* (2), described it as "couched in slovenly and inaccurate language."

Criticisms even more severe than these would, in my view, be well deserved. Your Lordships were referred to many authorities decided before 1907 on statutes dealing with waterworks and water supply to houses, somewhat similar in their provisions to those of this Act of 1907. It must, I suppose, be assumed that the draftsman who drafted this section had some intelligent appreciation of the points ruled, and of the principles laid down in these cases, and one would not unnaturally expect that when this last Act came to be drafted its framers would have made their meaning plain and clear, instead of leaving it obscure, as they have done.

It has been many times pointed out that this 25th section does not contain any complete definition of "domestic purposes," and that several of the purposes excluded by it are not true exceptions at all, that is, are not purposes which but for the exclusion would be covered by the words "domestic purposes," used in any rational sense. For instance, cleansing and watering streets or roads, railway purposes, public pumps, &c. And it is impossible to discover what principle, if any, guided the framers of the Act in selecting the purposes excluded.

According to the ordinary meaning of language, I take it that water supplied for domestic purposes would mean water supplied

(1) [1910] 2 K. B. 890, at p. 896. (2) [1912] A. C. 24.

to satisfy or help to satisfy the needs, or perform or help in performing the services, which, according to the ordinary habits of civilized life, are commonly satisfied and performed in people's homes, as distinguished from those needs and services which are satisfied or performed outside those homes, and are not connected with, nor incident to, the occupation of them.

It is plain from the provisions of the 7th and 8th sections of this statute that it is the character of the purpose for which the water is supplied, and not the character of the premises to which it is supplied, that is the crucial consideration in determining whether the water is supplied for domestic purposes or not.

Again it is plain from these sections that it is not at all necessary that the persons for whose use the water is supplied should reside on the premises supplied. In each of the following cases, decided on this statute of 1907 as well as on other statutes whose provisions were somewhat similar, it was held that residence on the premises supplied was no test as to whether water was supplied for domestic purposes or not: *Smith* v. *Müller* (1), *South-West Suburban Water Co.* v. *St. Marylebone Union* (2), and *South Suburban Gas Co.* v. *Metropolitan Water Board.* (3)

The case of *Colley's Patents, Ld.* v. *Metropolitan Water Board* (4) is to the same effect, as the staff who used the sanitary appliances for which the water was supplied did not reside on the premises. No person slept in them, and no portion of them was charged with the payment of inhabited house duty. Now, if this be the law, as I think it clearly is, I confess I am unable to discover any sound principle upon which the case of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (5) can be distinguished from the present. There the occupier of the premises supplied carried on therein the business of a lodging-house keeper. His guests were lodged as well as boarded. The water was used for the purposes of cleansing, cooking, drinking, and sanitary purposes. These are obviously domestic purposes. The preparation and supply of food, the cleansing of the appointments necessary

(1) [1894] 1 Q. B. 192.
(2) [1904] 2 K. B. 174.
(3) [1909] 2 Ch. 666.
(4) [1912] A. C. 24.
(5) [1902] 1 K. B. 310.

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to serve it, the cleansing of the rooms in which the food is served, the supply of water to be drunk with the food, the supply for flushing lavatories, are all domestic requirements. The guests paid for their board and lodging, and they resorted to the house solely for the purpose of being boarded and lodged. The water was supplied directly in and for that business, and was used in the conduct of it.

It was held that the water was supplied for domestic purposes, but if there be no virtue in residence as a test, it would appear to me that, on principle, precisely the same result should be arrived at if the guests had merely boarded on the premises and not lodged. And I think that the business of providing, for reward, food for the persons who resort to the occupier's premises is as much a business and no more than is the business of not only providing food for them but lodging them in addition. The fact that the occupier could probably feed more people on his premises than he could feed and in addition lodge cannot, in my view, affect the question.

It may well be that Channell J. was quite right in saying, as he did in that case (at p. 315 of the report), that the use of water for the domestic purposes of the inmates of the house is the thing which is covered by the water rate based on the annual value of the house, that "it is a rough way of measuring the amount of water likely to be used for domestic purposes by the number of the inmates which the house is capable of containing and accommodating." But the annual value of the house would as obviously be increased by its being turned from an unprofitable dwelling-house to a profitable eating-house, as by turning it from an unprofitable dwelling-house into a profitable board and lodging house. And, in a rough way, the Water Board would be remunerated as surely in the one case as in the other. Upon the following page the learned judge said: "I think that, although the supply for domestic purposes is paid for on the annual value, it does not make any difference whether the inmates of the home are guests who are entertained by the owner at his own expense, or whether they pay for their board and lodging, or whether they are pupils whose parents pay for their board and lodging, or whether they are paupers for whom the

parish pay. All those cases have been dealt with and decided; and it seems to me that our decision is governed by authority."

In *South-West Suburban Water Co.* v. *St. Marylebone Union* (1) the defendants were the owners and occupiers of premises in which they had erected and maintained schools for the education of children from the workhouse of the parish. The defendants required the plaintiffs to supply (on the usual terms) water to this school for domestic purposes, which the latter declined to do. The main question for decision was the right of the defendants to have this supply. At p. 180 Buckley J., as he then was, expressed himself thus: "But, granting that the schools are a dwelling-house, the next contention of the plaintiffs is that these premises have not and cannot have domestic purposes because that which is carried on upon the premises is a business, and that all the supply is for the purposes of that business. . . . . I agree that these premises are used to carry on a business. If I were to define the business carried on I should say that it is the business of providing for, maintaining, and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. . . . . But, although that which is carried on upon the premises is a business it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is, what is the character of the purpose, not what is the character of the place of user."

I think the decisions in this case and in the case of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) were perfectly right; but if the business carried on in this school was in fact the providing for and maintenance of pauper children, it is, I think, clear that the water supplied was at the same moment supplied both for domestic purposes and business purposes. This, indeed, must be so, inasmuch as the very essence of the business carried on was to supply those needs and render those services.

And when one has to construe this clumsily drawn and puzzling statute, one may well ask oneself, if the water supplied is at the same moment used, and intended to be used, for both purposes, and it is impossible to separate the one purpose from

(1) [1904] 2 K. B. 174. (2) [1902] 1 K. B. 310.

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the other, which consideration is to prevail? Is the domestic purpose to be treated as the real and dominant purpose, and the business purpose to be ignored, or vice versa?

I confess that the answer to this question which commends itself to my mind is this: that the business of maintaining these pauper children, or a business which consists in providing cooking and supplying food to persons who resort to the occupier's premises for the very purpose of having that food supplied, is not a "trade, manufacture, or business" within the meaning of the excluding clause of this 25th section.

Sir Robert Finlay admitted, on the principle laid down in *Colley's Patents Case* (1), that water used to supply food to, or provide some of the conveniences of civilized life for, the staff engaged in a factory would rightly be held to have been supplied for domestic purposes. He further, as I understood, admitted that if food was supplied to persons who resorted to the occupier's premises for some lawful purpose of business or pleasure, the water used to cook that food would be properly held to have been supplied for domestic purposes. I think this contention is absolutely sound. He went on, however, to contend, as it was absolutely necessary for the appellants' case that he should contend, that the result would be different if the only business carried on in the occupier's premises was the supply of food, and if the only purpose for which the persons resorted to those premises was to be supplied with food. In the one case he said the water would be used in the business only incidentally, as an ancillary for the convenience of customers or of the staff; in the other it would be used directly for the very purposes of the business itself. I cannot think that the framers of this statute ever intended to base the distinction between domestic purposes and trade purposes on such a narrow foundation as this.

Business in its widest sense means a "state or quality of being busy." "The state of being busily engaged in anything." "Industry, diligence." "Occupation, profession or trade, &c.": Murray's (the Oxford) Dictionary, vol. 1, p. 1205.

Sect. 9 provides for a rebate in certain cases where any house or building, or any part thereof, is occupied solely for "the

(1) [1912] A. C. 24.

purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit." It is obvious that a calling by which a person "seeks a livelihood or profit" may be a business in a very true sense, or a trade, and unless the word "calling" is used in this section to denote something akin to a profession, it would in this instance denote a business. If its meaning be not so restricted, then, unless there be a redundancy in the section, this word "business" must be taken in a restricted sense. The obligations and privileges of the Board are, therefore, apparently these: They are bound under s. 7 to supply water for domestic purposes, when required, without meter; they are equally bound, under s. 16, to supply, when required, water by meter for all purposes other than domestic; and under s. 20 they have the privilege of refusing to supply, otherwise than by measure, any house or building any part of which is used for any "trade or manufacturing purpose."

It would be but natural that a provision should be introduced into s. 25 to guard the privilege thus conferred by s. 20, and prevent the Board under any pretence, or by any device, from being deprived of the benefit of it. As the Board are bound to supply without meter water for domestic purposes, and are not bound to supply water otherwise than by meter for purposes of trade or manufacture, the two provisions would be brought into harmony by excluding the purposes of trade or manufacture from the meaning of domestic purposes, and would none the less be so if the word "business" was added in s. 25 with the object of covering businesses of the nature of trade or manufacture.

In my view, the principle of noscitur a sociis applies to this provision of s. 25. I think the business indicated is a business of the nature and character of some manufacture—or trade in the nature of manufacture—in which, to use Channell J.'s words, the water is, as it were, the raw material of the trade, not like the business carried on in this eating-house. Sir Robert Finlay pressed in his argument the case of public laundries. He urged that they render services for their customers which are usually rendered in one's home. I do not think the cases are analogous, and it is unnecessary to decide the point.

I am clearly of opinion that the purposes for which the water

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was in this case supplied were in their nature and character domestic, and the business carried on by the respondent was not a business within the meaning of s. 25. I therefore think that the judgment appealed from was right, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 12, 1914.

Solicitor for appellants: *Walter Moon.*
Solicitors for respondent: *Maitlands, Peckham & Co.*

[HOUSE OF LORDS.]

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WHITELEY AND ANOTHER . . . . . APPELLANTS;

AND

DELANEY AND OTHERS . . . . . RESPONDENTS.

Mortgage — Priority — Merger — Reconveyance and New Mortgage without Notice of Intermediate Charge—Concealment by Mortgagor of Intermediate Charge—Title based on Deeds framed under a Common Mistake—Yorkshire Registries Act, 1884 (47 & 48 *Vict. c.* 54), *s.* 14.

A freehold farm in Yorkshire was mortgaged, first, to A. to secure 300*l.*, and, secondly, to the plaintiff. Both mortgages were duly registered under the Yorkshire Registries Acts. The mortgagor, who was being pressed by A. for payment, offered to sell the farm to his daughter L. for 450*l.* L. accepted the offer conditionally on her being able to find some one to provide 300*l.* to pay off A. She consulted W., a solicitor, and told him she was buying the property for 450*l.* and wanted some one to provide the money due to A., and instructed him to carry out the transaction. W. introduced F., who agreed to advance 300*l.* on a first mortgage of the farm, and, on receipt of the money from F., paid off A. and obtained from him the title deeds on F.'s behalf. W. acted for all the parties except A. Neither W. nor any of the parties except the mortgagor had any knowledge of the plaintiff's mortgage, and the mortgagor did not disclose it. W. then prepared three deeds, which were duly executed and registered—1. a reconveyance by A. to the mortgagor; 2. a conveyance by the mortgagor

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to L.; 3. a mortgage by L. to F. An interval of three weeks elapsed between the payment off of A. and the execution of the deeds, the first two of which bore the same date, the third being dated the following day. The plaintiff, in an action against F., L., and the mortgagor, claimed that by virtue of the reconveyance to the mortgagor his mortgage had become a first charge on the property and that he was therefore entitled to priority over F.:—

Held, that the plaintiff was not entitled to priority, on the following grounds:—1. That, owing to a common mistake induced by the misconduct of the mortgagor, the deeds as framed did not express the true bargain between the parties, which was that F. should have a first mortgage on the property, and could have been rectified in the present action if the defendants had counterclaimed for that relief, and that in those circumstances a Court of Equity would not enforce in favour of a volunteer a title based upon deeds framed under a common mistake; 2. that, F. having acquired in equity the priority of A.'s mortgage by paying the mortgage debt and obtaining the title deeds, the plaintiff could not take advantage of the wrong of the mortgagor, through whom he claimed, to deprive F. of that priority.

Toulmin v. *Steere* (1817) 3 Mer. 210, considered.

Decision of the Court of Appeal [1912] 1 Ch. 735, reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Parker J. (2)

The facts are fully stated in the judgments of Parker J. and Fletcher Moulton L.J. and also in the judgment of the Lord Chancellor. The following outline of the facts is furnished for the purpose of rendering the position of the parties intelligible. Shortly before the transactions hereinafter referred to James Ackroyd was entitled to a first legal mortgage on a freehold farm in Yorkshire known as Lower Brow Farm to secure 300*l.* and interest. Edward Bromley Manks was entitled to a second mortgage on the farm to secure so much of two sums of 120*l* and 380*l.* as had not been repaid and interest. Ackroyd was entitled to a third mortgage on the farm to secure so much of a sum of 172*l.* odd as had not been repaid and interest. Manks was entitled to a fourth charge on the farm for divers small sums. Samuel Ogden was the owner of the equity of redemption in the farm. In 1907 Ackroyd was pressing Ogden for payment, and thereupon Ogden offered to sell the farm to his daughter, the appellant Louisa Whiteley, the wife of Wilson Whiteley, for 450*l.* Mrs. Whiteley accepted the offer conditionally on her being able

(1) [1912] 1 Ch. 735. (2) [1911] 2 Ch. 448.

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to find some one to provide the 300*l.* secured by Ackroyd's first mortgage, and she and her husband consulted Mr. Walshaw, a solicitor. They told him that Mrs. Whiteley had agreed to purchase the farm for 450*l.* and wanted some one to provide the 300*l.* due to Ackroyd, and verbally instructed him to carry through the transaction. Walshaw introduced the appellant Farrar, who agreed to advance the 300*l.* on a first mortgage of the property and left the matter in Walshaw's hands. Walshaw also acted for Ogden. On July 23, 1907, Walshaw obtained the 300*l.* from Farrar and on July 26 paid it to Ackroyd and obtained from him for Farrar possession of the title deeds relating to the property. The amount due to Ackroyd on his further charge was shortly afterwards agreed at 48*l.* odd and was paid to him out of Walshaw's private moneys, he being subsequently repaid by Mrs. Whiteley. The balance of the purchase-money was set off against a debt due from Ogden to Mrs. Whiteley. Throughout these transactions Ogden failed to disclose the second mortgage in favour of Manks, and neither the solicitor nor any of the parties except Ogden had any knowledge of the existence of that mortgage until shortly before action brought. In order to give effect to the intention of the parties Walshaw prepared three deeds which were duly executed by all the parties except Farrar and were duly registered in the Yorkshire Registry. By the first, which was dated August 16, 1907, Ackroyd, in consideration of the payment of the moneys secured by the first mortgage and further charge, reconveyed the property to Ogden. By the second, which bore the same date, Ogden, in consideration of 450*l.*, conveyed the property to Mrs. Whiteley. By the third, which was dated August 17, 1907, Mrs. Whiteley mortgaged the property to Farrar to secure 300*l.* and interest.

On October 19, 1910, Manks commenced an action against Mrs. Whiteley, Ogden, and Farrar, claiming a declaration that upon the reconveyance by Ackroyd to Ogden the second mortgage in favour of the plaintiff became a first charge on the farm and that he was entitled to priority in respect thereof over the defendants.

Parker J. dismissed the action, but his decision was reversed by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J.,

Fletcher Moulton L.J. dissenting), the majority of the Court being of opinion that they were bound by *Toulmin* v. *Steere* (1) to hold that Ackroyd's mortgage and further charge were completely extinguished and that the plaintiff's mortgage had priority.

Manks died since the commencement of the action and his legal personal representatives were respondents to the appeal. Ogden had been adjudicated a bankrupt, and his trustee in bankruptcy was also a respondent.

1913. Nov. 5, 6, and 7. *T. H. Carson, K.C.* (with him *Tomlin, K.C.*), for the appellants. The intention of the parties was that Farrar should pay off Ackroyd, the first mortgagee, on the terms of getting a first mortgage on the property, and that Mrs. Whiteley should purchase the equity of redemption. That was the effect of the instructions given to Walshaw, who acted as solicitor for all the parties except Ackroyd. Three weeks before the execution of the formal deeds Farrar through Walshaw paid off Ackroyd and obtained the title deeds from him with the result that he became equitable transferee of Ackroyd's mortgage. At this time and until shortly before the commencement of the action the solicitor and all the parties except Ogden were ignorant of the second mortgage in favour of Manks, and in consequence of this ignorance Walshaw, instead of taking the proper steps to keep alive Ackroyd's mortgage, prepared deeds in a form which did not carry out his instructions. The first deed was a reconveyance from Ackroyd to Ogden, the second was a conveyance from Ogden to Mrs. Whiteley, and the third was a first mortgage from Mrs. Whiteley to Farrar. The question is whether the formal deeds govern, so that Manks is to be preferred to Farrar, or whether the earlier circumstances creating an equitable interest in Farrar govern and remain unaffected by the subsequent deeds. The effect of the Yorkshire Registries Acts is to do away with the priority of the legal estate and to make this a question of equities. [He referred to the Yorkshire Registries Act, 1884, ss. 14, 15, and the Yorkshire Registries Amendment Act, 1885, s. 5.] The instructions to Walshaw were to get Farrar a first mortgage, but

(1) 3 Mer. 210.

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the effect of the deeds is to give him a second mortgage. The deeds were therefore not authorized by Walshaw's instructions, and in the circumstances the acceptance of the deeds by the parties cannot bind them to the legal result, for there can be no ratification of an unauthorized act without full knowledge of all the facts. Farrar, on paying off Ackroyd and obtaining the title deeds, acquired the rights of the latter, and all the rest is mere machinery. Ackroyd, having become a trustee for Farrar, could not convey to Ogden Farrar's outstanding interest, nor could Ogden convey to Mrs. Whiteley that which he had not got. The difficulty arises upon the third deed. Is the equitable security acquired by Farrar by the payment off merged in the later security taken by the deed? That is to a large extent a question of authority, and incidentally it raises the question whether *Toulmin* v. *Steere* (1) was rightly decided. Merger depends upon intention express or presumed. The true principle to be deduced from the authorities is that in the absence of express intention the question whether a charge which is paid off is merged or extinguished depends upon what is for the advantage of the person paying it off. In cases where there is no subsequent incumbrance the rule of the Court is that if the charge is paid off by a limited owner there is no merger, but if it is paid off by an absolute owner there is merger, and the reason for this rule is that in the former case it is for the advantage of the person paying off the charge that it should be kept alive for his own interest and that in the latter case it is not, since it would burden the estate to no purpose: *Morley* v. *Morley* (2); *Pitt* v. *Pitt* (3); *Donisthorpe* v. *Porter*. (4) The same principle applies equally to cases where there is a subsequent incumbrance: *Richards* v. *Richards* (5), where Wood V.-C. discusses a long series of authorities: *Worthington* v. *Morgan* (6); *Liquidation Estates Purchase Co.* v. *Willoughby*. (7)

[VISCOUNT HALDANE L.C. These deeds were entered into

(1) 3 Mer. 210.
(2) (1855) 5 D. M. & G. 610, at p. 620.
(3) (1856) 22 Beav. 294.
(4) (1762) 2 Eden, 162.
(5) (1860) John. 754, at p. 766.
(6) (1849) 16 Sim. 547.
(7) [1896] 1 Ch. 726, at pp. 734, 737; [1898] A. C. 321.

under a mutual mistake and could have been reformed, and on principle a Court of Equity would not enforce the title of a volunteer based on these deeds.]

Lord Gifford v. *Lord Fitzhardinge* (1) is an instance of a case in which the intention to keep a charge alive was held to control the form of the deeds.

[VISCOUNT HALDANE L.C. Manks is claiming a benefit based on Ogden's fraud, and a benefit for which he has given no consideration, and, having only an equitable title, can he succeed?]

That is one of the considerations which influenced Parker J. and Fletcher Moulton L.J. Parker J. makes some strong observations on the conduct of Ogden and Fletcher Moulton L.J. stigmatizes it as simply a fraud, assuming it was not his intention to keep the charge alive. Upon that view of the case *Scholefield* v. *Templer* (2) carries the appellants the whole way. It is, however, a matter of great importance to the profession to know whether *Toulmin* v. *Steere* (3) is still to be regarded as a binding authority. That decision has been severely criticized by Kay L.J. in *Liquidation Estates Purchase Co.* v. *Willoughby* (4) and by Sir Richard Couch in giving the judgment of the Privy Council in *Gokuldoss Gopaldoss* v. *Rambux Seochand.* (5)

[He was stopped.]

[He also contended, in answer to a question raised by the Lord Chancellor in the course of the argument, that Farrar was not estopped from claiming priority and cited *Heath* v. *Crealock* (6), *Keate* v. *Phillips* (7), and *Sharples* v. *Adams.* (8)]

P. O. Lawrence, K.C., and *Richard Watson* (with them *H. A. Hind*), for the respondents, the legal personal representatives of Manks. The respondents admit that this case falls to be determined on the facts and does not raise the question of the validity of *Toulmin* v. *Steere.* (3) No fraud has here been alleged by either party, and it is not the habit of the Court to impute

(1) [1899] 2 Ch. 32.
(2) (1859) John. 155.
(3) 3 Mer. 210.
(4) [1896] 1 Ch. 726, at p. 737.
(5) (1884) L. R. 11 Ind. Ap. 126, at p. 133.
(6) (1874) L. R. 10 Ch. 22.
(7) (1881) 18 Ch. D. 560.
(8) (1863) 32 Beav. 213.

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fraud where it is not alleged. Ogden swore that he believed that Manks had been paid off. Here the whole bargain by Farrar was to get a mortgage from Mrs. Whiteley. He left his solicitor to frame the security, and whatever he framed Farrar was prepared to accept. It was not intended as a security by way of transfer. The instructions received by Walshaw from all parties were not to take a transfer but to get rid of Ackroyd's debt. The effect of the transaction is to advance the second mortgage. In Yorkshire the legal estate is no help and upon the register the priorities are quite plain. To order rectification in a case like this would be contrary to the principle of the Court, which is that you rectify a deed in order to make it accord with the true bargain, not in order to give effect to the bargain which the parties would have made if they had known the facts. Here the true bargain was to get rid of Ackroyd's mortgage debt altogether, and that was the bargain expressed by the deeds. The effect of rectification would be to mould a different bargain for the parties, having regard to the facts which have subsequently come to light. This is the ordinary case of a second incumbrancer becoming first by the deliberate discharge of the first mortgage—an event which frequently occurs against the intention of the parties. The respondents are merely asking the Court to give effect to the title as it appears on the register. Ackroyd would be an essential party to any proceedings for rectification and he has never agreed to transfer.

[VISCOUNT HALDANE L.C. Under the Conveyancing Act Ogden could have called upon Ackroyd to transfer.]

Ackroyd had not got the property to transfer because he had parted with the deeds. Until the case came to this House there has been no suggestion for rectification, and no action for rectification would lie against Ackroyd. To rectify in such a case as this, where the deeds carry out the true bargain between the parties, would be going further than any case on the books. There being no claim for rectification, the Court will not declare the title of the parties on the hypothesis of the happening of an event which might never happen. To defeat the respondents' statutory right it is not enough to say that the Court would or might rectify. The mistake is due to the blunder of Walshaw

in not searching the register, and the effect of that omission is that the appellants are fixed with notice of the respondents' security: Conveyancing Act, 1882, s. 3.

The House took time for consideration.

1913. Dec. 9. VISCOUNT HALDANE L.C. My Lords, as the result of the consideration which I have given to this appeal, I have come to the conclusion that it is unnecessary for the House to express its opinion on the question whether *Toulmin* v. *Steere*(1) was rightly decided. The case must, I think, be disposed of on other grounds, grounds which were to some extent referred to in the judgments both of Parker J. and of Fletcher Moulton L.J.

Stripped of what is irrelevant, the events out of which the dispute has arisen may be stated as follows. On February 2, 1899, Samuel Ogden mortgaged the Cross Hotel at Haworth, in Yorkshire, to Edward Bromley Manks (whose executors are the respondents), to secure 1800*l.* and interest. On May 20, 1899, Ogden mortgaged other property at Halifax, in the same county, called the Gibbet Street house, to Manks, to secure 500*l.* and interest. On April 4, 1900, Ogden mortgaged his Lower Brow property at Haworth to Ackroyd to secure 300*l.* and interest. It is to this mortgage that the question in the present appeal chiefly relates. On July 18, 1900, Ogden charged the Cross Hotel in Manks' favour with a further sum of 120*l.* and interest, and on June 28, 1901, he charged the same property in favour of Manks with a still further sum of 380*l.* and interest. On October 16, 1901, Ogden, by way of collateral security to Manks for the two further advances of 120*l.* and 380*l.*, further charged the Gibbet Street house, and also made a second mortgage of the Lower Brow property, subject to Ackroyd's mortgage to Manks, to secure these further advances. This second mortgage is the title on which the case of the respondents rests. All these securities were duly registered in the Yorkshire Registry.

In the course of these transactions Manks ascertained that there was a charge on the Cross Hotel in favour of a bank, ranking by virtue of registration next after his mortgage for

(1) 3 Mer. 210.

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1800*l.*, and taking precedence of the further advances of 120*l.* and 380*l.* He then verbally arranged with Ogden that while the latter was in the usual way to pay the interest as it accrued on these three sums, the amounts so paid should not be appropriated to payment of such interest, but should be appropriated in part discharge of the principal sums of 120*l.* and 380*l.* until they had been wiped out. The interest on the 1800*l.* secured by the prior mortgage to Manks was meantime to remain in arrear and increase the amount for which Manks had priority over the bank.

The learned judge who tried the action found that the payments made by Ogden prior to August 19, 1905, were made on this footing, and that the sums of 120*l.* and 380*l.* were by so much reduced. On August 19, 1905, a new verbal agreement was come to, by which it was arranged, not only that future payments should be taken on account of interest, but that the past payments should be re-appropriated to interest instead of to capital account. The effect of the new agreement was that the Gibbet Street house and the Lower Brow property were recharged with the amount by which the sums of 120*l.* and 380*l.* had been reduced. But in the interval, on March 25, 1905, Ogden had further charged the Lower Brow property in favour of Ackroyd with 172*l.* 8*s.* 11*d.* and interest, and this further charge had been registered. These facts were found by Parker J. and his findings were not challenged on this appeal.

In 1907 Ackroyd was pressing Ogden for repayment, and the latter, being unable to find the money, offered to sell his Lower Brow property to his daughter, Mrs. Whiteley, the appellant, for 450*l.* Thereupon, about July 12, 1907, Mrs. Whiteley and her husband saw Walshaw, a solicitor, and told him that she wanted to find some one who would advance the 300*l.* due to Ackroyd, and that with this assistance she would buy the land. They left matters in Walshaw's hands. The latter communicated with a client of his own called Farrar, who agreed to advance 300*l.* on a first mortgage of the land, and handed this sum to Walshaw for the purpose. Walshaw carried through the transaction on behalf of all parties excepting Ackroyd, who had his own solicitor. In his evidence at the trial he was asked whether

he paid the 300*l.* to Ackroyd's solicitor some days before Ackroyd executed a reconveyance. He replied that he did, and that he then took up the deeds. "We paid off the 300*l.*, took up the deeds, and we were satisfied that we had got the title." "Because you had the deeds you thought you were safe?" "Yes."

I entertain no doubt that the effect of the payment under these circumstances was to make Ackroyd a trustee of the legal estate for Farrar as transferee in equity of the mortgage to the extent of the 300*l.* advanced by him. Now, neither Walshaw nor any of the other parties to the transaction knew of Manks' equitable security as second mortgagee, and Ogden did not disclose it. Consequently Walshaw framed the deeds which were required to carry out the sale and to give Farrar a legal mortgage and the title he had bargained for in the belief that Ogden had a clear title to the equity of redemption. These deeds were drawn in a form which he would certainly not have adopted had he known of the second mortgage to Manks. They were three in number. By the first, dated August 16, 1907, Ackroyd, the legal mortgagee, in consideration of the principal and interest under his mortgage having been repaid to him, conveyed to Ogden the Lower Brow property in fee simple. By the second deed, which was of the same date, Ogden, on his recital that he was secured in fee simple in possession free from incumbrances, conveyed to Mrs. Whiteley in consideration of 450*l.* paid to him by her. By the third deed, which was dated the next day, Mrs. Whiteley, on the recital that she was secured in fee simple free from incumbrances, conveyed by way of mortgage to Farrar to secure 300*l.* The three deeds were all registered in the Yorkshire Registry on August 28 at the same time, and it is plain that they formed steps in a single transaction.

My Lords, the intention of the parties, as shewn on the face of the deeds, was that Farrar should have a first mortgage, and it appears to me that this was the intention throughout. From the evidence of Walshaw and the other witnesses it is clear that the former paid the 300*l.* to Ackroyd's solicitor some three weeks prior to the execution of the new deeds, on the terms of getting the title deeds, and so obtaining temporarily an equitable first mortgage for his client Farrar. But for the outstanding second

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mortgage in favour of Manks, of which Ogden, for whom also he was acting, had left him in ignorance, the course he took would have been proper. As the facts were, the course adopted was a mistaken one. The deeds themselves were obviously, having regard to the recitals that the land was free from incumbrances, drafted in error. Moreover, by their terms, they purported to discharge the mortgage to Ackroyd and to effect the new mortgage to Farrar after the lapse of a day, a period which might have let in the second mortgage of Manks, which was registered, and which would, therefore, under normal circumstances, have taken precedence of the mortgage to Farrar, which was later in date. Had Walshaw known of Manks' incumbrance he would, of course, have so framed the deeds as to keep alive the equitable transfer of Ackroyd's mortgage which Farrar had obtained at the earlier date when he paid over his 300*l.* and took the deeds as security.

My Lords, there are two inferences which I draw from the facts proved at the trial. The first is that the parties to the three deeds must be taken to have agreed on instructions to Walshaw to the effect that the transaction was to be carried out by him in such a way as to give Farrar a first and legal mortgage, and to give Mrs. Whiteley the benefit of any charges she paid off. Farrar was to find 300*l.* and she was to find 150*l.* This it appears that she did, partly by paying to Ackroyd through Walshaw 48*l.* 5*s.* 6*d.*, which was the amount remaining due on Ackroyd's second security of March 25, 1905, and partly by releasing her father from debts which he owed to her. The second inference I draw is that Walshaw was instructed to carry this agreement, and nothing short of it, into effect, and that he framed the deeds in a form which failed to accomplish it. The reason of this failure was a mistaken belief, common to himself and all the parties to the deeds excepting Ogden, that Ogden's Lower Brow property was subject to no incumbrances other than the two in favour of Ackroyd. Ogden had withheld from them all knowledge of his mortgage to Manks. If Walshaw had known of this mortgage it would have been his duty to insert into the deeds he framed provisions which would have preserved the priorities of Ackroyd for the benefit of Farrar and Mrs.

Whiteley respectively. I think, therefore, that Farrar and Mrs. Whiteley would have been entitled to invoke the assistance of a Court of Equity in rectifying the deeds on the ground of common mistake. And apart from this, I think that neither Ogden, whose misrepresentation had given rise to the difficulty, nor any one claiming through him, could have insisted as against the others on a title arising from the mistaken form in which Walshaw had framed these deeds.

My Lords, so far as the transaction with Farrar is concerned, the case may be stated in another way. Ackroyd conveys to Ogden, who gets the legal fee simple. But Ackroyd was trustee for Farrar to the extent of the 300*l.* advanced by the latter, and Ogden knew this. Ogden must therefore be taken to have become trustee in his place. Ogden then conveys to Mrs. Whiteley, who took the legal fee simple in like manner subject to Farrar's charge, and she then makes what is in form a fresh legal mortgage for the amount of his charge to Farrar. Farrar having thus become entitled in equity to the priority of Ackroyd's mortgage, this priority could not be taken from him without his consent. Now it is certain that Ogden could not have said that as between himself and Farrar he had destroyed the latter's equitable title, and it is equally clear that no one claiming only through him, as Manks did, could be in a better position. Unless, then, the parties to the deeds in question are to be taken to have destroyed Farrar's equitable title with his assent, he must succeed as against Manks. Now it is clear that no one so intended unless Ogden did, and if he so intended Manks can derive no benefit from his misconduct. It is said that all the parties, including Farrar, left matters in the hands of Walshaw to carry out the transaction as he thought best, and that they must abide by what he has done. But, as I have already pointed out, I think it clear that these instructions were based upon a definite agreement under which Walshaw was to frame the deeds so that Farrar should have a first mortgage. Misled by Ogden, and believing, as all the other parties believed, that no other security given by Ogden stood in the way, Walshaw drew the deeds in a form which did not carry out what must be taken to have been the antecedent bargain. If so, Ogden certainly

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could not have insisted on their having effect in the form in which they were framed. He could not have taken advantage of his own wrong, nor could he have resisted a rectification which would have made the deeds carry out the bargain of the parties. But Manks only claims through Ogden. His title is equitable, and is no greater than that of the latter, and it is, for the purposes of a question with Farrar, the title of a volunteer who has given no consideration for the new priority which he is claiming. That title, therefore, remains subject to Ackroyd's original prior mortgage, which equity will not treat as displaced by the act of Ogden.

My Lords, this conclusion appears to me to be inevitable. Whether the question is approached on the footing that Manks could not be allowed in equity to take advantage of the wrong done by Ogden, through whom he claimed, or whether the question is approached in the light of the principle that a Court of Equity will not enforce instruments which have been fashioned under a common mistake, the parties to the proceedings for such enforcement being the parties who would be required by the Court to be before it if these proceedings had embraced a counter-claim for rectification, I think that the appellants, Farrar and Mrs. Whiteley, are both entitled to succeed in this appeal on these grounds alone.

In the Courts below the discussion was chiefly directed to another question, on which Parker J. decided in favour of the appellants, but the Master of the Rolls and Buckley L.J. (Fletcher Moulton L.J. dissenting) overruled him. That question was whether the case was governed by the decision of Sir William Grant in *Toulmin* v. *Steere*. (1) Sir William Grant was a great master of equity, and his judgments are regarded with deep respect. But the judgment in *Toulmin* v. *Steere* (1) has been the subject of much criticism, and the more I have examined it the more difficult have I found it to discover a principle consistently applied. The difficulty is not rendered less by the fact that some six years previously Sir William Grant had himself, in *Forbes* v. *Moffatt* (2), stated the true principle with the lucidity of which he was a master. The decision is not an

(1) 3 Mer. 210.

(2) (1811) 18 Ves. 384.

application of what was laid down in *Otter* v. *Lord Vaux* (1), that a mortgagor purchasing the interest of his first mortgagee cannot derogate from his own bargain by setting up the mortgage so purchased against a second mortgagee. For in *Toulmin* v. *Steere* (2) it was not the grantor of the second mortgage, but subsequent purchasers of the equity of redemption, whose title was interfered with, and it is far from apparent why the rule should have any application to such a case. Indeed, it is now quite plain that a purchaser from a mortgagor and the first mortgagee can always, if he chooses, keep the first mortgage alive, and so protect himself against subsequent incumbrances, whether he had notice of them or not. Such authorities as *Stevens* v. *Mid-Hants Ry. Co.* (3), *Adams* v. *Angell* (4), and *Thorne* v. *Cann* (5) in this House illustrate the distinction between such cases and those where, as in *Otter* v. *Lord Vaux* (1), there is a direct relation of contract with the second mortgagee.

What the Master of the Rolls and Buckley L.J. held in the Court of Appeal in the present case does not seem to me to have been inconsistent with any of these authorities. Parker J. had found that the manner in which the two interests became united in Mrs. Whiteley made it difficult to distinguish the case from *Toulmin* v. *Steere* (2), but he thought that, as the effect of the subsequent authorities was that the doctrine of *Toulmin* v. *Steere* (2) was not to be extended, it ought not to govern the case before him. He was of opinion that Mrs. Whiteley had no notice, constructive or otherwise, of Manks' mortgage. Whether this fact ought logically to form a good ground for a distinction he doubted, but it did constitute, in his view, a circumstance which, on the authorities that declared that *Toulmin* v. *Steere* (2) was not to be extended, he was bound to take into account. Apart from *Toulmin* v. *Steere* (2), he was of opinion that the form of the deeds was not necessarily inconsistent with an intention to keep the prior incumbrance alive, and for this he relied on the decision in *Burrell* v. *Lord Egremont* (6), where a tenant for

(1) (1856) 2 K. & J. 650; 6 D. M. & G. 638.
(2) 3 Mer. 210.
(3) (1873) L. R. 8 Ch. 1064.
(4) (1877) 5 Ch. D. 634.
(5) [1895] A. C. 11.
(6) (1844) 7 Beav. 205.

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life, having paid off a charge, procured the inheritance to be released from it, under circumstances and in a form which appeared to exclude an actual intention to keep the charge alive, and it was yet held that no intention to merge it had been proved.

My Lords, the Master of Rolls did not, I think, dissent from the general statement of the law made by Parker J. But he said that where the person who pays off a charge is not the tenant for life, but the owner in fee of the estate charged, the presumption is that he does not intend to keep the charge alive. He thought that in the present case there had been constructive notice, but he did not rely on constructive notice as making a difference, nor did he think that *Toulmin* v. *Steere* (1) really turned on notice. What he held, and Buckley L.J. agreed with him, was that *Toulmin* v. *Steere* (1) was an authority for the proposition that in a case like the present one there was a presumption that the purchaser did not intend to keep the charge alive, and that as *Toulmin* v. *Steere* (1) had never been expressly overruled he ought to follow it, and hold that no intention to keep the charge alive had been established.

My Lords, I think that in the case before us it is difficult, quite apart from *Toulmin* v. *Steere* (1), so far as the mere form of the deeds is concerned, to come to a different conclusion as to an intention to merge from that of the majority in the Court of Appeal. These deeds proceed on a plain recital that Ogden, and then Mrs. Whiteley, were seised in fee simple free from incumbrances, and they seem to me to disclose an intention to merge. It is true that in *Burrell* v. *Lord Egremont* (2) there was no expression of intention in the instruments which the Court had to construe which pointed to an intention to preserve the charge alive, and yet it was held that the benefit of the charge was preserved. But in the present case I think it tolerably plain that the intention of Walshaw was to unite the equity of redemption and the mortgage in a new unincumbered fee simple. If so prima facie there was a merger. I do not rely on *Toulmin* v. *Steere* (1) for this conclusion, nor do I think it necessary, or even proper, to express an opinion as to whether any part of the doctrine of *Toulmin* v. *Steere* (1) is law to-day. What I

(1) 3 Mer. 210. (2) 7 Beav. 205.

do rely on is the form of the deeds and the circumstances of this particular transaction. But these, for reasons which I have already given, are not, in my opinion, conclusive as against the appellants. I interpret the facts differently from the majority in the Court of Appeal. I think that, as I have already said, there was an agreement come to before Walshaw was instructed to draw the deeds, to the effect that Farrar was to be right through the transaction in the position of a first mortgagee, and that Walshaw was misled into the mistake of framing the deeds on a different footing because of Ogden's concealment of Manks' incumbrance. It is upon this ground that I rest my opinion on the appeal before the House.

My Lords, I mention the Yorkshire Registries Acts merely for the purpose of saying that they do not assist the respondents. For s. 14 of the Act of 1884, which gives priority according to date of registration, provides that nothing in the section is to operate to confer on any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and that any disposition of land or charge on land, which, if unregistered, would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner. I think that it is plain that the registration of the conveyance of August 16, 1907, to Ogden could give neither to him nor to Manks, as claiming through him, any advantage to be derived from the Registration Acts.

The only claim made by the respondents in their statement of claim is for a declaration of the priority of Manks' security of October 16, 1901, and for a conveyance of the legal estate and consequential relief. I am of opinion that this claim, so far as it has been controverted, fails, and that Parker J. was right in dismissing the action.

I move that the judgment of the Court of Appeal be reversed and that of Parker J. restored. The respondents must pay the costs here and in the Court of Appeal.

My Lords, I may add that Lord Kinnear has requested me to inform your Lordships that he concurs in this conclusion.

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LORD DUNEDIN. My Lords, in this case I think it is absolutely necessary to begin by formulating to oneself a clear view of the facts. Indeed, I think that the difference of judicial opinion which is shewn in the judgments under review will be found really to flow from the different views which the learned judges concerned have taken of the true facts of the case. I do not recapitulate these facts. They are set out at length in the judgment of Parker J. and have been again stated in detail by the Lord Chancellor. I will merely state the conclusions I draw from them. I hold that Farrar only parted with his 300*l.* to his agent Walshaw upon the terms that in return for his money he was to have a first mortgage over the Lower Brow Farm; that Walshaw in obedience to those instructions paid Farrar's money to Ackroyd, and took from Ackroyd on Farrar's behalf the title deeds to the property which Ackroyd then held in his capacity of first and legal mortgagee.

That ended what may be called the first chapter of the transaction. The other things happened three weeks later.

I pause here to observe that my view of the facts coincides with that taken by Parker J., who conducted the trial, and Fletcher Moulton L.J. in the Court of Appeal; it does not coincide with that of the Master of the Rolls nor with that of Buckley L.J. The Master of the Rolls takes the view that the 300*l.* was paid to Ackroyd by Ogden. Buckley L.J. thought it was paid by Mrs. Whiteley, and both consequently incline to the view that the taking over of the title deeds by Walshaw from Ackroyd was only in order to prepare the necessary deeds, and not in order to assure security to Farrar. I believe it is this difference in the view of the facts which is at the root of the divergence of opinion.

Taking, then, the facts as I hold them to be, the position of the matter at this time was that Farrar was in equity in the place of Ackroyd, and could have compelled a transference of Ackroyd's mortgage.

Now, Farrar left it to his agent Walshaw to carry out what he wished by appropriate conveyancing, and here it is that the complication begins. Walshaw was not only agent for Farrar, but he was also acting as solicitor, that is as agent, for Ogden

and for the Whiteleys. Indeed, it was at the instance of Ogden and the Whiteleys—induced by the fact that Ackroyd was threatening to foreclose—that any alteration in the status quo was contemplated. The alteration contemplated was that Mrs. Whiteley should acquire the property, and that Ackroyd should be got out of the way. But Mrs. Whiteley had not money enough to get Ackroyd out of the way, and she commissioned Walshaw to find some one who would find money to effect that object. Walshaw accordingly set himself to find Farrar, to whom he proposed the granting of a loan on first mortgage. He found Farrar and paid off Ackroyd with Farrar's money, and took the title deeds. Three weeks after he had thus paid off Ackroyd he proceeded to carry out, as he thought, the instructions of all his clients in the way we know, and in a way which would have fulfilled the instructions of all of them had it not been for the existence, unknown to all except Ogden, of the second mortgage in favour of Manks. But as the deeds were executed, if nothing but these could be looked at, the result was indubitably not to carry out the intentions of Farrar. As the deeds stood the effect was that all that Farrar got was a mortgage which, Ackroyd's mortgage being gone, was inferior in preference to that of Manks.

Mr. Lawrence, in the very succinct and able argument which he addressed to the House, urged that the deeds carried out the bargain made, and that if in the event Manks got a benefit, which he could hardly have anticipated, it was only because the bargain made by Farrar, Ogden, and the Whiteleys was carried out in terms, and that Manks got no more than he was entitled to; because his original mortgage, though a second mortgage, was always on the terms that it should be a first if the existing first from any cause was wiped out. Or, as he put it, the pervading idea of the whole arrangement was that Ackroyd's mortgage should disappear and that Farrar should hold a mortgage flowing from Mrs. Whiteley.

I think that the fallacy in this view consists in ignoring the independent position of Farrar. Farrar was no party to the troubles of Ogden, who was pressed by Ackroyd, or the endeavours of the daughter, Mrs. Whiteley, to come to the rescue of her

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father. He was a pure investor to whom his solicitor proposed that he should lend 300*l.* as a first mortgage over a sufficient subject. His only idea, and that of his solicitor for him, was that the 300*l.* should be so secured. To say that this idea was swallowed up by the pervading idea as above expressed is, I humbly think, to confound the method of effectuating a certain object with the object itself.

It appears to me, therefore, that as soon as the mistake made was discovered, and so long as no new rights to third parties had arisen on the faith of what had been done, Farrar would have been entitled to have the mistake rectified. Who could have opposed? Not Ogden, for he could not have taken advantage from his own wrongful concealment. Not the Whiteleys, for ex hypothesi they thought what was done was giving Farrar all he had stipulated for. Not Ackroyd, for he had no interest, and could not be prejudiced either way. What, then, was it in the mouth of Manks to say? The transaction was res inter alios acta as far as he was concerned. He had given no consideration for this transaction. And, further, he is only here because he is appealing to an equitable right. So that his equitable right, based upon his original contract, must needs come to this—a right to prevent equity doing, as between other parties with whom he had no concern, what equity would otherwise insist on doing. But his contract right was against Ogden alone, and if, as in a question with Ogden, the equitable right of Farrar to have the deeds reformed would have prevailed, it seems clear that there can be no equity in Manks to prevent that being done.

Actual rectification of the deeds is not necessary. It is conceded that to refuse Manks the declaration he asks is sufficient. The result is that attained by the formal judgment of Parker J.

This view approaches the case from rather another aspect than that which has loomed largely in much of the argument, and some of the judgments of the Courts below, but I do not think it is a new view. Thus Fletcher Moulton L.J. says (1): "It" (that is the equitable interest of Farrar in Ackroyd's mortgage) "remained alive whether" Ogden "intended it or not, because it

(1) [1912] 1 Ch. 735, at p. 753.

was in the hands of Farrar and never passed to Ogden" (by Ackroyd's reconveyance). "The consequence is that in spite of the absolute language of the reconveyance this is not a case in which the owner of the equity of redemption in fact acquired the interest of the first mortgagee by the payment off of a mortgage debt and a reconveyance of the estate. . . . . Ogden conveyed all that he had got to his daughter, but he could not convey that which he did not possess, namely, the outstanding first charge to Farrar." That embodies, in my view, in other words, the argument which I have sought to express.

This view absolves me from the duty of considering whether the much-canvassed case of *Toulmin* v. *Steere* (1) was or was not rightly decided. I confess I avoid that task with gladness. Not only was the judgment that of a great judge, but it is many years old; and only the strongest reasons should make a Court of last resort upset a judgment on a point of conveyancing which has remained as authority for so long a time. It is clear, however, that there has been, to say the least of it, a great reluctance on the part of judges learned in equity to extend the principle of *Toulmin* v. *Steere* (1) beyond the limits of its own facts.

All seem agreed that in debateable cases merger takes place or not according to intention. Indeed, this seems a necessary corollary to the interposition of equity; for otherwise why not leave the parties to their position at law? The difference of opinion seems to come to a question of onus. Where law would involve merger, and where equity can save that consequence, is the onus on those who seek to say that there is merger or on those who will have the contrary? Must you prove an intention to merge, or an intention to keep alive the security?

I think, taking the cases cited as a whole, that the general view comes to this. Where by appropriate conveyancing the charge could be preserved (this excludes all cases of which *Otter* v. *Lord Vaux* (2) is a type), then it will be for the party alleging the charge to be dead to shew an intention to that effect. What have been called the presumptions arising from the continued existence of the charge being to the benefit of the person who has paid it off, as, e.g., in the case of payment by a limited owner,

(1) 3 Mer. 210. (2) 2 K. & J. 650; 6 D. M. & G. 638.

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are just, I think, other ways of expressing the same rule. In the application of this rule to the facts of the present case all depends on whether the true payer of the charge was Farrar; and here, as I have already said, I prefer the views as expressed by Parker J. and Fletcher Moulton L.J. to those that are opposed.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the two judgments which have just been delivered by my noble and learned friends. I concur in them, and I have nothing to add.

Order of the Court of Appeal reversed and order of Parker J. (now Lord Parker of Waddington) restored. The two first named respondents (the legal personal representatives of Manks) to pay the costs in the Court of Appeal and of the appeal to this House.

Lords' Journals, December 9, 1913.

Solicitors for appellants: *Williamson, Hill & Co., for Walshaw & Son, Halifax.*

Solicitors for respondents, the legal personal representatives of Manks: *Burn & Berridge, for G. H. Manks, Elland, Yorkshire.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . } INTERVENANTS.

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July 3, 7, 8, 9, 10, 11; *Dec.* 2.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Legislative Authority of Province—Power to grant Fishing Rights—Railway Belt—Tidal Waters—Navigable Non-tidal Waters—Territorial Waters—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92, 109.

In pursuance of the Terms of Union under which British Columbia was admitted into the Union of Provinces constituted by the British North America Act, 1867, the Legislature of that Province by two statutes granted to the Government of the Dominion a strip of public land extending to twenty miles on each side of the railway to be constructed under those terms. This strip of land is known as the railway belt. By the British North America Act, 1867, s. 91, the legislative authority of the Parliament of Canada extends to "(12.) sea coast and inland fisheries," and by s. 92 the Provincial Legislature may exclusively make laws in relation to "(13.) property and civil rights in the Province." In answer to questions submitted to the Supreme Court under the Supreme Court Act (R. S. C., 1906, c. 139), s. 60:—

Held: (1.) It is not competent to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt; so far as those waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament; so far as they are not tidal, whether navigable or not, they are matters of private property and under the grant became vested in the Crown in the right of the Dominion. (2.) It is not competent to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in the sea, including arms of the sea and estuaries of rivers; the right of fishing in the sea is a public right, not dependent upon any proprietary right, and the Dominion has the exclusive right of legislating with regard

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, and LORD MOULTON.

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to it. (3.) The right of the public to fish in the sea does not depend upon any title in the Crown to the subjacent lands. The question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown, or is merely subject to special powers for protective and police purposes, is not one which belongs to municipal law alone, and it is not at present desirable that any municipal tribunal should pronounce upon it.

APPEAL by special leave from a judgment of the Supreme Court (February 18, 1913) answering questions referred for hearing and consideration.

Under an order made by the Governor-General in Council on June 29, 1910, the following questions were referred to the Supreme Court for hearing and consideration in pursuance of the Supreme Court Act (R. S. C., 1906, c. 139), s. 60 :—

1. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as to such waters as are tidal, and (*b*) as to such waters as, although not tidal, are in fact navigable ?

2. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province ?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the Province, or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low water mark in the said waters or any of them ?

The material facts were as follows. By an Ordinance promulgated by the Governor of the Colony of British Columbia on November 19, 1858, in which year the Colony was established, the laws of England, criminal and civil, as they existed on that date were declared to be in force in the Colony " so far as the

same are not from local circumstances inapplicable." By an Ordinance in 1867 the Ordinance of 1858 was made applicable to the whole of the new Colony of British Columbia, including Vancouver, thereby constituted.

On May 16, 1871, the Colony of British Columbia was admitted into the Union of Provinces in pursuance of the British North America Act, 1867, s. 146. The Terms of Union under which this admission took place are annexed to the Order in Council of May 16, 1871, by which the admission was effected. By art. 5 of those terms it was agreed that the Dominion of Canada should assume and defray the charges for (inter alia) "the protection and encouragement of fisheries." By art. 11 the Government of the Dominion undertook to secure the completion of a railway to connect the seaboard of British Columbia with the railway system of Canada, and the Government of British Columbia agreed to convey to the Government of the Dominion, in trust, to be appropriated in such manner as the latter might deem advisable in furtherance of the construction of the railway, a belt of public lands along the line of railway throughout its entire length in British Columbia, not to exceed twenty miles on each side of the line.

In pursuance of art. 11 the Government of British Columbia by an Act of the Legislative Assembly, 43 Vict. c. 11, amended by 47 Vict. c. 14, granted to the Dominion Government a strip of public lands now known as and referred to in the above questions as the railway belt.

The British North America Act, 1867, by s. 91 provides that the exclusive authority of the Parliament of Canada shall extend, amongst other matters, to the following:—(1.) Public debt and property; (10.) navigation and shipping; (12.) sea coast and inland fisheries; and by s. 92 that Act assigns to the Provincial Legislature exclusive legislative authority over, among other matters, (13.) property and civil rights in the Province.

The reference was heard by the Supreme Court on November 26 and 27, 1912. Pursuant to orders of that Court the Attorneys-General for the Provinces of British Columbia, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Prince Edward Island, and Alberta were notified

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of the hearing and were given liberty to appear, and, with the exception of the last two named, all the above named were represented at the hearing. The Attorneys-General for Ontario, Quebec, New Brunswick, and Manitoba were interveners in the present appeal.

On February 18, 1913, the Supreme Court pronounced its opinion upon the questions submitted as follows:—

"Treating the questions as relating only to rights of fishing as commonly understood this Court was of the opinion as follows:—

"As to the first question submitted, to answer the same in the negative.

"As to the second question, to answer the same in the negative in so far as it relates to the exclusive right to fish in the waters therein mentioned, but to refrain from answering the said question in so far as it relates to any right other than exclusive to fish in the waters therein mentioned.

"As to the third question, to answer the same in the negative in so far as it relates to the exclusive right to fish in the waters therein mentioned, but to refrain from answering the said question in so far as it relates to any right other than exclusive to fish in the waters therein mentioned."

Duff J., with whose judgment the Chief Justice together with Davies and Brodeur JJ. agreed, was of opinion that questions 2 and 3 should be answered in the negative in so far as they referred to the grant of exclusive rights of fishing in tidal waters, on the ground that by the law of England the right of fishing in tidal waters is prima facie in the public; that this presumption was not inapplicable to the conditions in British Columbia and was therefore the law of British Columbia when the Province entered the confederation; that under the British North America Act, 1867, s. 91 (12.), these public rights could only be limited or controlled by the Dominion Parliament. With regard to question 1 the learned judge was of opinion that, in so far as it referred to non-tidal waters, it should be answered in the negative, on the ground that the ownership of the beds of navigable non-tidal waters within the railway belt passed as an ordinary profit of the soil unless at the date of the Union the title of the Crown

was burdened with a public right of fishing which was only capable of being restricted or limited through the exercise of legislative authority, and that if such a public right did exist the Parliament of Canada alone had legislative authority to limit or restrict it. The learned judge further said that no suggestion had been made in the argument as to the character of any possible non-exclusive right, that he did not understand what point was intended to be raised by the reference to such a possible right in question 2, and that he treated that question as confined to exclusive rights.

Idington J. and Anglin J. each delivered judgments substantially to the same effect.

Sir R. Finlay, K.C., *Lafleur, K.C.*, and *Geoffrey Lawrence*, for the appellant. The beds of all tidal waters, including estuaries of rivers and arms of the sea, vest in the Crown jure prerogativæ. But for Magna Charta, the Crown could by its prerogative right grant the exclusive right of fishing therein to a private individual either together with or distinct from the soil: *Malcolmson* v. *O'Dea* (1); *Murphy* v. *Ryan* (2); *Mayor of Carlisle* v. *Graham* (3); *Neill* v. *Duke of Devonshire* (4); passages from Hale's De Jure Maris (5), cited in the last-named case; *Lord Advocate* v. *Wemyss* (6); *Parker* v. *Lord Advocate* (7); *Fitzhardinge* v. *Purcell.* (8) After the establishment of the Colony of British Columbia in 1858 the beds of all tidal waters within the Colony and the fishing rights therein were vested in the Crown in the right of British Columbia. The right of fishing whether belonging to private individuals in non-tidal waters or to the Crown in tidal waters is a right of property: *Murphy* v. *Ryan* (2); this right of property was not affected by the British North America Act, 1867. Lord Herschell in delivering the opinion of the Board in *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces* (9) points out the distinction between proprietary rights and legislative authority and

(1) (1863) 10 H. L. C. 593.
(2) (1868) I. R. 2 C. L. 143.
(3) (1869) L. R. 4 Ex. 361.
(4) (1882) 8 App. Cas. 135; (1876) L. R. Ir. 2 C. L. 132.
(5) 1 Harg. Law Tracts, p. 11.
(6) [1900] A. C. 48.
(7) [1904] A. C. 364.
(8) [1908] 2 Ch. 139.
(9) [1898] A. C. 700, at p. 709.

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says: "whatever proprietary rights were at the time of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada." Though the right to grant an exclusive right to fish in tidal waters cannot since Magna Charta be exercised by the Crown, the right still exists and can be exercised by the Legislature, and in British Columbia it can be exercised by the local Legislature, since within the area and subjects prescribed by the British North America Act, 1867, the Province has the same legislative authority as the Imperial Parliament: *Hodge* v. *Reg.* (1); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (2); *Attorney-General for Ontario* v. *Attorney-General for Canada.* (3) Neither did the grant of the railway belt affect a transfer to the Dominion of the fishing rights in tidal waters which were vested in the Crown. Although the right of fishing is not of precisely the same character as the prerogative right to minerals which it was held in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (4) did not pass with the railway belt, the effect of that decision is in the appellant's favour. Lord Watson expressly states that the conveyance only contemplated a transfer to the Dominion of the provincial rights to manage and settle the lands and that it was not intended that the proprietary rights in the lands should be taken out of the Province. In *Burrard Power Co.* v. *Rex* (5) the Board was not dealing with fishing rights and the decision is distinguishable. The judgment affirms the view expressed by Lord Watson as to the object of the conveyance of the railway belt. Under the British North America Act, 1867, s. 92, enumeration 13, the Legislature of British Columbia has exclusive legislative authority to make laws in relation to "property and civil rights in the Province"; this authority includes the power to grant an exclusive right of fishing in tidal waters. The legislative authority of the Dominion under s. 91, enumeration 12, namely as to "sea coast and inland fisheries," is confined to regulating the manner in which such rights may

(1) (1883) 9 App. Cas. 117.
(2) [1892] A. C. 437.
(3) [1912] A. C. 571, at p. 581.
(4) (1889) 14 App. Cas. 295, at pp. 301, 302.
(5) [1911] A. C. 87.

be exercised: *In re Provincial Fisheries* (1); the same case on appeal, *Attorney-General for Canada* v. *Attorneys-General for the Provinces*. (2) [The following cases also were referred to as to the legislative authority of the Dominion and of the Provinces: *City of Montreal* v. *Montreal Joint Railway* (3); *Dobie* v. *Temporalities Board*. (4)

In British Columbia non-tidal navigable waters should be treated as in the same position as tidal waters as regards fishing rights. The civil laws of England as they existed in 1858 were declared to be in force in British Columbia, but only so far as they were not from local circumstances inapplicable. The law of England relating to non-tidal waters is inapplicable to the lakes and great waterways of Canada. Where a river or lake in British Columbia is navigable in fact, although not tidal, the bed and the right of fishing, subject to the right of the public, vest in the Crown. On this point reference was made to the judgment of Anglin J. in *Keewatin Power Co.* v. *Town of Kenora* (5), the judgment of Strong C.J. in *In re Provincial Fisheries* (6), and, upon the question of prescriptive rights of the public, to the judgment of Lord Blackburn in *Caldwell* v. *McLaren* (7); *Goodman* v. *Mayor of Saltash* (8); *Murphy* v. *Ryan* (9); Hale's De Jure Maris (1 Harg. Law Tracts, at p. 18); Angell on Watercourses, 7th ed., § 549, p. 712.

[Their Lordships intimated that they did not propose to deal with the question as to whether the property in the soil of the sea under territorial waters vests in the Crown, but reference was made to *Reg.* v. *Keyn* (10), *Carr* v. *Fracis Times & Co.* (11), and the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73).]

Sir R. Finlay, K.C., and *Lafleur, K.C.*, also appeared, *Geoffrion, K.C.*, being with them, for the intervenants, who adopted the contentions of the appellant.

(1) (1896) 26 Can. S. C. R. 444, at p. 531.
(2) [1898] A. C. 700, at pp. 709, 711.
(3) [1912] A. C. 333.
(4) (1882) 7 App. Cas. 136.
(5) (1906) 13 Ont. L. R. 237; subsequently reversed (1908) 16 Ont. L. R. 184.
(6) 26 Can. S. C. R. 444, at pp. 520, 531.
(7) (1884) 9 App. Cas. 392, at pp. 404, 405.
(8) (1882) 7 App. Cas. 633.
(9) I. R. 2 C. L. 143, at p. 154.
(10) (1876) 2 Ex. D. 63.
(11) [1902] A. C. 176, at p. 181.

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Newcombe, K.C., Bateson, K.C., Stuart Moore, and *Raymond Asquith,* for the respondent. The effect of the decision in *Burrard Power Co.* v. *Rex* (1) is conclusive that the grant of the railway belt carried with it every right and interest of the Province in the lands, conveyed including the water rights. As to non-tidal waters, whether navigable or not, the right of fishing passed to the Dominion as an incident of the land conveyed. It is clear that by the law of England the right of fishing in non-tidal waters vests in the owner of the soil whether the waters are navigable or not, and the public cannot by prescription or otherwise obtain a right of fishing in them: *Pearce* v. *Scotcher* (2); *Smith* v. *Andrews* (3); *Blount* v. *Layard* (4); *Murphy* v. *Ryan* (5); *Johnston* v. *O'Neill.* (6). See also the judgment of the Special Commissioners of English Fisheries set out in *Leconfield* v. *Lonsdale.* (7) There is no valid reason why in British Columbia the law as to tidal waters should be extended to navigable non-tidal waters. Lord Macnaghten in *Johnston* v. *O'Neill* (8) points out that no distinction for this purpose can be drawn between a large lake and a small one.

As to the tidal waters (including arms of the sea and estuaries of rivers) the rule laid down in *Malcolmson* v. *O'Dea* (9) applies, and the soil vests in the Crown, but the right of fishing vests in the public. If the Province retained any proprietary right in the soil, that right was, under s. 109 of the British North America Act, 1867, "subject to any trusts existing in respect thereof." The public right of fishing in tidal waters is in the nature of a trust vested in the Crown: *Murphy* v. *Ryan* (10); Chitty on the Prerogatives of the Crown, pp. 142, 143; Gould on Waters, 2nd ed., ch. 1, s. 20, p. 41. The effect of s. 109 was considered in *Attorney-General for Canada* v. *Attorney-General for Ontario* (11) and in *St. Catherine's Milling and Lumber Co.* v. *Reg.* (12); those decisions shew that "trust" in s. 109 is not confined to such

(1) [1911] A. C. 87.
(2) (1882) 9 Q. B. D. 162.
(3) [1891] 2 Ch. 678.
(4) [1891] 2 Ch. 681, n.
(5) I. R. 2 C. L. 143.
(6) [1911] A. C. 552.
(7) (1870) L. R. 5 C. P. 657, at p. 665.
(8) [1911] A. C. 552, at p. 578.
(9) 10 H. L. C. 593.
(10) I. R. 2 C. L. 143, at p. 149.
(11) [1897] A. C. 199, at p. 210.
(12) (1888) 14 App. Cas. 46, at p. 55.

trusts as a Court of Equity would administer, but is used in a wider sense. The public right of fishing in tidal waters, as also in the sea, is a matter exclusively within the legislative authority of the Dominion Parliament under the British North America Act, 1867, s. 91; it falls within enumeration 12, "sea coast and inland fisheries"; also within enumeration 1, "public debt and property." The word "fisheries" in enumeration 12 is used in the sense of rights of fishing as appears from clause 5 of the Terms of Union, under which the Dominion agreed to assume and defray the charges of (inter alia) "protection and encouragement of fisheries." The regulation of "sea coast and inland fisheries" coming expressly within the legislative authority of the Dominion under s. 91, it is provided by the final words of the section that this authority is not to be cut down by reason of matters of a "local or private" nature included in s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); *Attorney-General for Canada* v. *Attorneys-General for the Provinces.* (2) Further, the legislative authority given to the Provinces under s. 92 is only in relation to existing rights and property and does not include the creation of a new right. The right of fishing in tidal waters and in the sea being a right of the public generally is not "property"; if it is, then the Dominion under s. 91 have the exclusive authority to regulate it, including authority to grant the right to individuals.

Sir R. Finlay, K.C., in reply, referred to s. 117 of the British North America Act, 1867, which provides that the several Provinces shall retain all their public property not otherwise disposed of in that Act.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This is the appeal of the Government of British Columbia from answers given by the Supreme Court of Canada to certain questions submitted to it by the Canadian Government, under the authority of a statute of the Dominion Parliament. The questions did not arise in any litigation, but were questions of a general and abstract character relating to the fishery rights of the Province.

(1) [1896] A. C. 348, at pp. 362, 363. (2) [1898] A. C. 700, at p. 712.

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It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario* v. *Attorney-General of the Dominion.*(1) It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present appeal.

The questions submitted to the Supreme Court of Canada were as follows:—

1. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as

(1) [1912] A. C. 571.

to such waters as are tidal, and (*b*) as to such waters as, although not tidal, are in fact navigable?

2. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the Province or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right or any right to fish below low water mark in the said waters or any of them?

Before dealing with these questions it is necessary to refer to the nature and origin of the Constitution of the Province of British Columbia. The Province was established by an Imperial statute passed in 1858, and by various Orders in Council made under its provisions a Government was set up consisting of a Governor and a local Legislature. By certain of these Orders, and by a local Ordinance of 1867, the civil and criminal law of England, as it existed in 1858, was made the law of the Colony so far as it was not from local circumstances inapplicable. By an Imperial statute of 1866 the Colony of Vancouver Island was united with and thenceforth became part of the Colony of British Columbia.

In 1871 British Columbia was admitted, under s. 146 of the British North America Act, into the Union of Provinces which that Act constituted. The instrument by which the union was actually effected was an Order in Council, but it was necessarily based on addresses from both Houses of the Canadian Parliament, and from the Legislative Council of British Columbia. These addresses contained the terms and conditions upon which these two quasi-independent communities proposed, through their respective Legislatures, that the union should be effected,

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and these terms and conditions, so far as approved of by their then Sovereign, were intended to be embodied in the Order in Council effecting the union, which was to have the same effect as if it had been enacted by the Parliament of the United Kingdom.

The Order in Council dated May 16, 1871, recites that each of the several things had been done which were required by s. 146 of the British North America Act, and the terms and conditions proposed in the addresses and approved of by the Crown are annexed to this Order. By paragraph 5, sub-head E, of these latter, Canada, i.e., the Dominion of Canada, undertook to assume the protection and encouragement of fisheries and defray the expenses of the same, and thereby became bound so to do. By the first clause of paragraph 11, the Dominion also undertook amongst other things to secure the commencement within two years from the date of the union of, and to complete within ten years, a railway from the Pacific coast to such a point east of the Rocky Mountains, to be selected, as would secure that the seaboard of British Columbia should be connected with the railway system of Canada. By the second clause of paragraph 11 the Government of British Columbia became bound to convey to the Dominion Government, or rather to the Crown in right of the Dominion, in trust to be appropriated in such manner as the Dominion Government should deem advisable in furtherance of the construction of this railway, a certain extent of public lands, therein described, lying along the railway line throughout its entire length, not to exceed twenty miles in extent on each side of the line, and in consideration of this the Dominion Government undertook to pay to the Government of British Columbia 100,000 dollars per annum. Neither the Legislature of the Province of British Columbia nor that of the Dominion has power by legislation to alter the terms of this Order in Council (which is in effect an Imperial statute), or to relieve themselves from the obligations it imposes upon them.

Both the Dominion Government and the Government of British Columbia have performed the obligations thus imposed upon them. The Canadian Pacific Railway has been constructed, which connects the eastern seaboard of Canada with the western

seaboard of British Columbia. On the other hand the Legislature of British Columbia has passed two statutes, namely, 43 Vict. c. 11 and 47 Vict. c. 14, in order to discharge the obligation to grant what is now known as the railway belt (so far as it lies within the Colony) to the Government of the Dominion of Canada. By the combined effect of these statutes there was granted to the Dominion Government in trust to be appropriated as to the Government might seem advisable the public lands along the line of the Canadian Pacific Railway wherever it might finally be located to a width of twenty miles on each side of the said line as provided in paragraph 11 of the terms annexed to the Order in Council admitting the Province of British Columbia into confederation with the other Colonies of the Dominion.

The construction of the language of the grant of the railway belt has already come before this Board on more than one occasion. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) it was decided that the grant was in substance an assignment of the rights of the Province to appropriate the territorial revenues arising from the land granted. Nevertheless it was held that it did not include precious metals which belonged to the Crown in right of the Province, because, as was said by Lord Watson, such precious metals are not partes soli or incidents of the land in which they are found, but belong to the Crown as of prerogative right, and there are no words in the conveyance purporting to transfer Royal or prerogative as distinguished from ordinary rights. It was pointed out in the judgment in that case that the word "grant" as used in the statute under construction was not, strictly speaking, suitable to describe a mere transfer of the provincial right to manage and settle the land and appropriate its revenues. The title remained in the Crown, whether the right to administer was that of the Province or that of the Dominion. It is true that in the course of the judgment Lord Watson also expressed the view that when the Dominion had disposed of the land to settlers it would again cease to be public land under Dominion control and revert to the same position as if it had been settled by the Province without ever having passed out of its control. Their Lordships, however,

(1) 14 App. Cas. 295.

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have not on the present occasion to consider questions which might arise if this had taken place, inasmuch as the belt, so far as is material for the purposes of this appeal, is still unsettled and remains under the control of the Dominion.

Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the Province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum. This view is in harmony with what has been decided by this Board in another case in which the effect of the grant of the railway belt came into question, *Burrard Power Co.* v. *Rex* (1), where it was held that a grant of water rights on a lake and river within the belt made by the Government of the Province was void. The grounds of the decision of the Board in that case were that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of s. 91 of the British North America Act, and were, therefore, under the exclusive legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the Provincial Government.

During the course of the argument, some reliance was placed by counsel for the Province of British Columbia on the fact that by the supplemental agreement recited in the preamble to the British Columbian Act of 1883 the Dominion is with all convenient speed to offer for sale the lands within the railway belt to settlers. But their Lordships are unable to see how

(1) [1911] A. C. 87.

this can affect the question of what passed to the Dominion under the so-called grant. They are unable to see any ground for construing the grant of the railway belt as excluding such lands situated within it as are covered with water. The solum of a river bed is a property differing in no essential characteristic from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value. The minerals under it can be worked, and in addition there are special rights which flow from its ownership which are of themselves valuable and may be made the subject of sale. And even in view of the construction of the railway itself the possession of the solum of the rivers or lakes might become most essential in connection with the building of bridges, &c. Moreover, in districts situated at a distance from the actual railway track, the power of using the solum of the river for the purpose of the construction of bridges might be essential to the settling and disposal of adjacent lands. The plain language of the grant leaves it, in their Lordships' opinion, impossible to imply any limitations of the generality of that language or to make its operation dependent on whether land situated in the belt was or was not covered with water, or, if so covered, whether the rivers or lakes that cover it were of small or large dimensions. The whole solum within the belt with all the rights appertaining thereto passed to the Dominion.

In the present case, therefore, their Lordships entertain no doubt that the title to the solum and the water rights in the Fraser and other rivers and the lakes so far as within the belt are at present held by the Crown in right of the Dominion, and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues. It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum, and it then becomes a profit à prendre in alieno solo and an incorporeal hereditament. The severance

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may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the solum.

The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognize it as giving to the owners of lands on the foreshore or within an estuary or elsewhere where the tide flows and reflows a title to fish in the water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is prima facie in the public. Lord Hale in his De Jure Maris, in a passage cited with approval by Lord Blackburn in his judgment in *Neill* v. *Duke of Devonshire* (1), states the law as follows: "The right of fishing in this sea" (i.e., the narrow seas adjoining the coasts) "and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river . . . . But though the King is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty."

Although their Lordships agree with Lord Blackburn in his approval of this citation from De Jure Maris, their Lordships must not be understood as assenting to all the expressions used by Lord Hale, and more especially to his assumption that the Crown is owner of the solum of what he speaks of as the narrow

(1) 8 App. Cas. 135, at p. 177.

seas. In Lord Hale's time the conception even of the three-mile limit did not exist, and it is clear that Lord Hale meant to include in the dominion of the Crown something much wider even than this. Nor do they think that Lord Blackburn's approval was intended by him to relate to this point, it being quite irrelevant to the case which he had under his consideration at the time. But their Lordships are in entire agreement with him on his main proposition, namely, that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as parens patriæ no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts.

But to the practice and the right there were and indeed still are limits, or perhaps one should rather say exceptions. "The King," says Lord Hale in another passage (De Jure Maris, printed at p. 373 of Stuart Moore's History and Law of the Foreshore and Sea Shore, 3rd ed.), "used to put as well fresh as salt rivers in defenso for his recreation, that is, to bar fishing or fowling in a river till the King had taken his pleasure or advantage of the writ or precept de defensione ripariae, which anciently was directed to the sheriff to prohibit riviation in any rivers in his bailiwick. But by that statute it is enacted quod nullae ripariae defendantur de caetero, nisi illae quae fuerunt in defenso tempore Henrici regis avi nostri, et per eadem loca et

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per eosdem terminos, sicut esse consueverunt tempore suo." The words of Magna Charta quoted by Lord Hale are of a very general character, and are not confined to tidal waters. If they had remained unconstrued by the Courts doubts might well have been entertained, as pointed out by Lord Blackburn in *Neill* v. *Duke of Devonshire* (1), whether the 16th chapter, which contains the words cited, did more than restrain the writ de defensione ripariæ, by which, when the King was about to come into a county, all persons might be forbidden from approaching the banks of the rivers, whether tidal or not, in order that the King might have his pleasure in fowling and fishing. If this were the true interpretation of the words of Magna Charta it would indicate that the general right of the public to fish in the sea and in tidal waters had been established at an earlier date than Magna Charta, so that it was only necessary at that date to guard the subject from the temporary infractions of that right by the Crown in the rivers as well tidal as non-tidal which were covered by the writ de defensione ripariæ. But this is a matter of historical and antiquarian interest only. Since the decision of the House of Lords in *Malcolmson* v. *O'Dea* (2), it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.

Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a "liberty of fishing in the sea or creeks or arms thereof," Lord Hale makes the exception, "unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil. In all such cases the

(1) 8 App. Cas. 135, at p. 177. (2) 10 H. L. C. 593.

proof of the existence and enjoyment of the right has of necessity gone further back than the date of Magna Charta. The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself. But it is not necessary to do more than refer to the point in explanation of the words of Lord Hale, because no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta.

It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in rivers and estuaries or on the foreshore) within the railway belt stand prima facie as follows: In the non-tidal waters they belong to the proprietor of the soil, i.e., the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner. But we now come to the crux of the present case. The restriction above referred to relates only to Royal grants, and what their Lordships here have to decide is whether the Provincial Legislature has the power to alter these public rights in the same way as a sovereign Legislature, such as that of the United Kingdom, could alter the law in these respects within its territory.

To answer this question one must examine the limitations to the powers of the Provincial Legislature which are relevant to the question under consideration. They arise partly from the provisions of ss. 91 and 92 of the British North America Act, 1867, and partly from the Terms of Union of British Columbia with the Confederation with which we have already dealt. By s. 91 of the British North America Act, 1867, the exclusive

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legislative authority of the Parliament of Canada extends to all matters coming within (amongst other things) "sea coast and inland fisheries." The meaning of this provision was considered by this Board in the case of *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces* (1), and it was held that it does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on this exclusive right provincial legislation cannot trench. It recognized that the Province retains a right to dispose of any fisheries to the property in which the Province has a legal title, so far as the mode of such disposal is consistent with the Dominion right of regulation, but it held that, even in the case where proprietary rights remain with the Province, the subject-matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly it sustained the right of the Dominion to control the methods and season of fishing and to impose a tax in the nature of licence duty as a condition of the right to fish, even in cases in which the property in the fishery originally was or still is in the Provincial Government.

The decision in the case just cited does not, in their Lordships' opinion, affect the decision in the present case. Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore, when by s. 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "navigation and shipping" their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate

(1) [1898] A. C. 700.

public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the Province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the Province.

These considerations enable their Lordships to answer the first question, which reads as follows:—

"Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as to such waters as are tidal, and (*b*) as to such waters which, though not tidal, are navigable?"

The answer to this question must be in the negative. So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament. So far as the waters are not tidal they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and cannot be vested in the public generally.

They now come to the second question, which is: "Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?"

Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the Province might, consistently with s. 91, be taxed in respect of its exercise for the reasons pointed out by

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Lord Herschell (1), but no such taxing could enable the Province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the Provincial Legislature.

In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league. The importance of claims based upon such a proprietary title arises from the fact that they would not be affected by the grant of the lands within the railway belt. But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

They desire, however, to point out that the three-mile limit is something very different from the "narrow seas" limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *Reg.* v. *Keyn* (2) is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore

(1) [1898] A. C. at p. 713. (2) 2 Ex. D. 63.

below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn C.J. in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

Their Lordships therefore find themselves in agreement with the Supreme Court of Canada in answering the first and second questions in the negative.

The principles above enunciated suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is in their Lordships' opinion a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the Province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the Province, which is excluded from general legislation with regard to sea coast and inland fisheries.

Their Lordships think that what they have now said affords a sufficient answer to the third question. It is in the negative. They will humbly advise His Majesty that the three questions should be answered in the fashion they have indicated. In accordance with the usual practice in such cases there will be no costs of this appeal.

Solicitors for appellant: *Gard, Rook & Co.*
Solicitors for respondent: *Charles Russell & Co.*
Solicitors for intervenants: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1913 *July* 11, 14, 15, 16, 21, 22; *Nov.* 11.

CHARLES S. COTTON AND ANOTHER . . . . APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

AND CONSOLIDATED CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Revenue—Succession Duties—Province of Quebec—Property outside Province—Powers of Provincial Legislature—Direct Taxation—Ultra vires—55 & 56 Vict. c. 17, s. 1, art. 1191b—Quebec Succession Duties Act (6 Edw. 7, c. 11), s. 1, arts. 1191b and 1191c—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92.

Held, (1.) that neither the Quebec Succession Duties Act of 1906 nor the Succession Duties Act of that Province passed in 1892 upon its true construction imposes any duty upon the transmission of movable property outside the Province; (2) that the taxation imposed by the Quebec Succession Duties Act of 1906 is not "direct taxation" within the meaning of the British North America Act, 1867, s. 92, and is consequently ultra vires the Legislature of the Province.

CONSOLIDATED APPEAL and cross-appeal by special leave from a judgment of the Supreme Court (February 20, 1912) which reversed in part the judgment of the Court of King's Bench (Appeal side) of Quebec (June 30, 1910) confirming with a variation the judgment of the Superior Court of Quebec (January 17, 1900).

The litigation giving rise to the appeal and cross-appeal followed upon the claim of the Government of the Province of Quebec to the payment of succession duty in respect of the estates of Charlotte L. Cotton and of Henry H. Cotton, her husband. Charlotte L. Cotton died on April 11, 1902, leaving an estate consisting in part of property in the said province and in part of bonds, debentures, shares in industrial companies, and other movable property locally situated in the United States of America. At the time of her death she was

* *Present*: VISCOUNT HALDANE L.C., LORD ATKINSON, and LORD MOULTON.

domiciled in the Province of Quebec. By her will, after making certain specific bequests, she left the residue of her estate to her husband, Henry H. Cotton, whom she appointed her executor.

At the time of the death of Charlotte L. Cotton the law in force in the Province of Quebec as to succession duties was contained in 55 & 56 Vict. c. 17 (1) and in subsequent amending statutes (57 Vict. c. 16, 58 Vict. c. 16, and 59 Vict. c. 17) which did not affect the questions arising upon the appeals.

The Government of the Province of Quebec claimed and received from Henry H. Cotton, as executor of the will of the said Charlotte L. Cotton, succession duties at the statutory rate upon the whole net property passing under the will of his said wife.

On December 26, 1906, the said Henry H. Cotton died domiciled in the said province, leaving estate consisting in part of property in the Province of Quebec and in part of bonds, debentures, shares in industrial companies, and other securities and movable property locally situated in the United States of America.

At the time of the death of Henry H. Cotton the law in force in the Province of Quebec as to succession duties was contained in the statute 6 Edw. 7, c. 11 (the Quebec Succession Duties Act). (2)

The Government of the province claimed from the executors of the said Henry H. Cotton (the appellants in the principal appeal and herein called the appellants) succession duties at the

(1) 55 & 56 Vict. (Quebec) c. 17, s. 1, enacts the following article:—"1191b. All transmissions, owing to death, of the property in, usufruct or enjoyment of, moveable and immoveable property in the Province shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death" (then follow provisions, amended by 57 Vict. c. 16, as to the rates of payment).

(2) 6 Edw. 7, c. 11, s. 1, re-enacts art. 1191b, above set out, with the addition of the words "or the" before "usufruct," and further enacts the following article:—"1191c. The word 'property' within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, and whether the transmission takes place within or without the Province, and all moveables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death."

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statutory rate calculated upon the whole net property passing under his will.

On July 12, 1909, the appellants filed in the Superior Court of Quebec a petition of right praying for a declaration that His Majesty was indebted in the right of the Province of Quebec to the appellants in the sum of $31,492 with interest, the said sum being the aggregate of the amounts of succession duties paid upon the estates of Charlotte L. Cotton and of Henry H. Cotton respectively upon the said movable property locally situated in the United States of America and outside the said province.

The judgment of the Superior Court was delivered on January 17, 1910, by Malouin J., holding that the appellants were entitled to the amounts claimed on the ground that under the British North America Act, 1867, s. 92, enumeration 2, the Legislature of the Province of Quebec had not the right to tax movable property situated outside the limits of the province.

From this decision the respondent appealed to the Court of King's Bench (Appeal side), and on June 30, 1910, that Court delivered judgment confirming, with a slight modification, the judgment of the Superior Court, the said judgment being modified by declaring that the debts of Henry H. Cotton should be deducted from the total assets and not from the assets in the Province of Quebec alone. The judgment of the Court was delivered by Carroll J.; it was to the effect that the case was governed by the decision in *Woodruff* v. *Attorney-General for Ontario* (1), and that even if the tax was in form imposed upon the transmission and not upon the property it would be invalid as being an attempt to do indirectly what the Legislature is forbidden to do directly.

The respondent appealed to the Supreme Court, and the appellants cross-appealed as to the above modification in the judgment of the Superior Court. On February 20, 1912, the Supreme Court delivered judgment, allowing the appeal by a majority of four (Fitzpatrick C.J., Idington, Duff, and Brodeur JJ.) to two (Davies and Anglin JJ.) in so far as the estate of Henry H. Cotton was concerned, but dismissing by an equal division of opinion the appeal as to the estate of Charlotte L. Cotton. The cross-appeal as to the modification above referred to was dismissed, and there was no

(1) [1908] A. C. 508.

appeal from this part of the decision. The effect of the judgments in the Supreme Court (which are reported at 45 Can. S. C. R. 469) was shortly as follows: The learned Chief Justice considered that the statutes in force at the death of Charlotte L. Cotton did not purport to extend to property actually outside the province, but that the effect of the introduction into the Succession Duties Act, 1906, of the definition of "property" was to extend that statute to all property devolving under the law of the province, whether situated within or without the province. As to the power of the Legislature of the province to enact such a law, the learned Chief Justice, applying the principle mobilia sequuntur personam, held that the intention of the Legislature was to tax the transmission of title, and that the succession was to be looked upon as a universitas, in which, by virtue of the law under which succession devolved, the representative could get no title until the duty imposed by law had been paid. Idington, Duff, and Brodeur JJ. each delivered a judgment in favour of allowing both appeals upon grounds in the main similar to those of the Chief Justice. They considered that *Woodruff's Case* (1) was distinguishable. Davies J. and Anglin J. were each of opinion that the appeal should be dismissed as to both estates. The latter learned judge, while agreeing with the learned Chief Justice that the definition of property in the Act of 1906 had the effect of extending the ambit of the tax to property outside the province, differed from him in that he held that such a tax was ultra vires the power of the Provincial Legislature as not being taxation within the province. The question whether the tax was ultra vires the Legislature on the ground that it was not direct taxation was considered only by Idington J. and Duff J., each of whom was of opinion that it was direct taxation.

R. C. Smith, K.C., T. Chase-Casgrain, K.C., and *Geoffrey Lawrence*, for the appellants. Succession duty was not payable, either upon the death of the wife or upon that of the husband, in respect of that part of their respective estates which consisted, of movable property outside the province, and the appellants are entitled to recover the amounts paid subject to the modification

(1) [1908] A. C. 508.

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made in the Court of King's Bench. The duties in force both in 1902 and in 1906 are by art. 1191b as enacted by 55 & 56 Vict. c. 17, s. 1, and by the Succession Duties Act, 1906 (6 Edw. 7, c. 11), imposed only upon "moveable and immoveable property in the province." By the use of those express words the application of the maxim mobilia sequuntur personam is excluded. The French version of art. 1191b, in which "situés dans la province" necessarily refers to the word "biens," makes it clear that the Acts impose the tax upon property situated in the province, and not upon a transmission in the province of property situated elsewhere. Arts. 1191d and 1191e (provided by the Act of 1906) are only consistent with the duty being imposed upon the property and not upon the transmission. The definition of property introduced into the Succession Duties Act of 1906 by art. 1191c cannot have the effect of extending the operation of art. 1191b of that Act, because whatever the meaning of the word property the scope of the taxation is limited by that article to so much of the property as is within the province. The words "in the province" were inserted in the Acts in order to prevent the taxation from being ultra vires the Provincial Legislature. If the effect of the enactments in force in 1902 or in 1906 is to impose a tax in respect of property outside the province the taxation is ultra vires the power of the Provincial Legislature as to taxation, which is limited by the British North America Act, s. 92, to direct taxation within the province. The judgment in *Woodruff* v. *Attorney-General for Ontario* (1) conclusively shews that if the effect of the statute is to impose a tax upon a transmission within the province of property locally situated outside its limits, the Legislature would be merely attempting to do indirectly that which it is precluded from doing directly. [*Blackwood* v. *Reg.* (2) and *Lambe* v. *Manuel* (3) were referred to.] The decision in *Rex* v. *Lovitt* (4) is distinguishable because the basis of that decision was that the property was held not to be situated in New Brunswick for the purpose of the Act. Although the construction of an Act of Parliament will not be

(1) [1908] A. C. 508, at p. 513.
(2) (1882) 8 App. Cas. 82.
(3) [1903] A. C. 68.
(4) [1912] A. C. 212.

limited in order to avoid overlapping of taxation with a foreign jurisdiction, this is a consideration in ascertaining the limits of provincial Legislatures inter se. Further, if the statute of 1906 extends the taxation as contended for, the taxation is not "direct taxation" within the meaning of s. 92, and is ultra vires: *Attorney-General for Quebec* v. *Reed* (1); *Bank of Toronto* v. *Lambe* (2); *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario.* (3) The effect of the above decisions is to adopt Mill's definitions of a direct and an indirect tax for the purpose of the Act. They are as follows: "A direct tax is one which is demanded direct from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs": Mill's Political Economy, bk. v., ch. 3. Under art. 1191g (5.) in the Act of 1906 payment of the duties has to be made by the person making the declaration of the property transmitted, who under art. 1191g (1.) may be the executor or the notary before whom the will is executed, he having to collect the amount paid from the estate or beneficiaries. The duties are therefore not a direct tax within that definition. [*Colquhoun* v. *Brooks* (4) was also referred to.]

Sir R. Finlay, K.C., Geoffrion, K.C., and *T. Mathew*, for the respondent. Upon the true construction of the statutes the transmission of movable property, wherever situated, belonging to a person domiciled within the province at his death is liable to the duties imposed. The duties are imposed upon the transmission and not upon the property. In the present case both the testators were domiciled at their death within the province and the transmission of the whole movable property took place there. By the words "in the province" there is included in the operation of the section not only property physically situated in the province, but also movable property which according to the maxim mobilia sequuntur personam is governed by the law of the testator's domicil: *Thomson* v. *Advocate-General* (5);

(1) (1885) 10 App. Cas. 141.
(2) (1887) 12 App. Cas. 575.
(3) [1897] A. C. 231.
(4) (1889) 14 App. Cas. 493.
(5) (1845) 12 Cl. & F. 1.

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Wallace v. *Attorney-General* (1); *Harding* v. *Commissioners of Stamps for Queensland.* (2) The definition of property added in 1906 by art. 1191c must be given effect to as extending the scope of art. 1191b to movables, wherever situated, of persons having their domicil in Quebec. The words "in the province" in art. 1191b of the Act of 1906 should be treated as struck out, since they are inconsistent with the provision in art. 1191c. Even if the first part of art. 1191c would extend the taxation beyond the powers of the Legislature the latter part is intra vires, and the section should be read as limited by the powers of the Legislature: *Rex* v. *Lovitt.* (3) The duties imposed are called by the Acts succession duties but are of the nature of probate duties having regard to art. 1191g (6.) of the Act of 1906. The view of the learned Chief Justice on this point was correct. It is intra vires a provincial Legislature to impose a tax upon a transmission within the province of movable property situated elsewhere. The decision in *Woodruff* v. *Attorney-General for Ontario* (4) is distinguishable. In that case there was a transfer intra vires in New York, and this fact was the true basis of the decision. There is a vital distinction between a transfer of movable property intra vivos and a transmission of movable property by death, the former being governed by the lex situs and the latter by the law of the domicil of the deceased person: Dicey's Conflict of Laws, ed. 1908, r. 143, p. 519; r. 144, p. 522; pp. 750 et seq. *Woodruff's Case* (5) is also distinguishable on the ground that the statute there under discussion in terms imposed the tax upon the property and not upon its transmission. The succession duties imposed by the Acts are direct taxation. The object of the British North America Act, s. 92, in limiting the powers of the provincial Legislatures to imposing direct taxation was to prevent them from imposing customs and excise duties, and taxes strictly analogous thereto, which these succession duties are not. The provision that the person making the declaration required under the Act shall pay the duties cannot affect the character of the tax, but is only machinery for its collection. The payment is made by him

(1) (1865) L. R. 1 Ch. 1.
(2) [1898] A. C. 769.
(3) [1912] A. C. 212.
(4) [1908] A. C. 508.

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on behalf of the persons liable and is entirely different from a payment of customs or excise, which there is no legal right to recover from another source. [In addition to Mill's definitions there were referred to Littré, Dict., s.v. " contribution " ; Legrand, Dict. Usuel de droit, s.v. " contribution " ; The Oxford Dict., s.v. " direct tax."] The taxation imposed by the Succession Duties Acts is more nearly analogous to that held to be intra vires in *Bank of Toronto* v. *Lambe* (1) and in *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario* (2) than that held to be ultra vires in *Attorney-General for Quebec* v. *Queen Insurance Co.* (3) and in *Attorney-General for Quebec* v. *Reed.* (4)

R. C. Smith, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD MOULTON. In the principal appeal now before their Lordships the appellants are the executors under the last will and testament of Henry H. Cotton, late of Cowansville in the Province of Quebec. It raises the question whether the movable property of the testator situate outside the Province of Quebec is liable to duty under the Quebec Succession Duties Act of 1906. In the cross-appeal the Crown is appellant and the above-mentioned executors are respondents, and it raises the question whether the movable property belonging to Charlotte Leland Cotton, the wife of Henry H. Cotton (who died on April 11, 1902), situated outside the Province of Quebec was liable to succession duty under the statutes then in force regulating such duty. The history of the litigation is as follows : At all material times Henry H. Cotton was domiciled in the Province of Quebec. His wife, Charlotte Leland Cotton, by her last will and testament, after making certain special bequests, left all the residue of her estate to her said husband, whom she appointed executor of her will. The value of the estate was proved to be $359,441. With the exception of property valued at $24,490, which was locally situate in the Province of Quebec, the estate consisted substantially of bonds, debentures,

(1) 12 App. Cas. 575.
(2) [1897] A. C. 231.
(3) (1878) 3 App. Cas. 1090.
(4) 10 App. Cas. 141.

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shares, &c., and it was locally situate in the United States of America. The Government of the Province of Quebec claimed duties upon the whole of the estate of the testatrix, and not only upon the portion situate in the Province of Quebec, and such duties amounting to $11,193.25 were accordingly paid by the said executor.

Henry H. Cotton died on December 26, 1906, and by his last will appointed the appellants his executors. The value of his estate was proved to be $341,385.38, of which property to the value of $11,074.46 and no more was locally situate in the Province of Quebec. The balance of the estate (consisting for the most part of bonds, debentures, shares, &c.) was locally situate in the United States of America. He also left debts to the amount of $4659.90, for which his estate was liable. The Government of the Province of Quebec claimed from the appellants as executors the sum of $21,360.42, being the duties calculated upon the whole net property passing under the will, and this sum the appellants were accordingly compelled to pay as such executors.

On July 12, 1909, the appellants filed a petition of right praying for a return of $10,548.55 in respect of the estate of Charlotte L. Cotton, and a sum of $20,943.47 in respect of the estate of Henry H. Cotton, on the ground that neither under the statute regulating the succession duty in the Province of Quebec at the date of the death of Charlotte L. Cotton, nor under the statute regulating the same at the date of the death of Henry H. Cotton, was movable property locally situate outside the Province of Quebec liable to pay succession duty. It is admitted on behalf of the Crown that (subject to a small correction in respect of the debts due by the said Henry H. Cotton at the date of his death) the said sums are correctly calculated, and also that, if the appellants are right in their contention that at neither of the said dates was the movable property locally situate outside the Province of Quebec legally liable to pay succession duty, the said executors are entitled to be repaid the sums so claimed by them subject to the said correction.

The case came on for hearing in the Superior Court of Quebec before Malouin J., who on January 17, 1910, gave judgment for

the appellants for the full amount of their claim with interest from July 12, 1909, and costs. From this decision the Crown appealed to the Court of King's Bench (Appeal side), and on June 30, 1910, that Court gave judgment confirming the judgment of the Superior Court subject to the reduction of the amount claimed by a sum of $393, the Court holding that the debts due from the estate of the said Henry H. Cotton should have been deducted pro rata from the property situated outside the Province of Quebec, and not entirely from that situated within that province. The correctness of this variation by the Superior Court is not contested by the appellants.

The respondent appealed from the above judgment of the Court of King's Bench to the Supreme Court of Canada, and on February 20, 1912, that Court delivered judgment to the following effect. The appeal so far as it related to the claim for the return of money overpaid in respect of the estate of Charlotte L. Cotton was dismissed, the six judges of the Court being equally divided on the point. The appeal with regard to the amount claimed to be overpaid in respect of the estate of Henry H. Cotton was allowed, the Court being of opinion, by a majority of four to two, that under the laws regulating succession duty in the Province of Quebec at the date of his death the whole of his estate was liable to pay such duty. A cross-appeal by the present appellants against the small correction mentioned above was dismissed, and from this dismissal no appeal has been brought.

The present appeals are brought from the above decisions of the Supreme Court of Canada. The appellants appeal from the decision relating to the duties upon the estate of Henry H. Cotton, and the Crown appeals as to the decision so far as it affects the duties upon the estate of Charlotte L. Cotton. It will be seen, therefore, that the matter in dispute is solely as to the effect of the statutes regulating succession duty at the dates of the death of Charlotte L. Cotton and Henry H. Cotton respectively.

At the date of the death of Charlotte L. Cotton, the section imposing succession duty, which was in force, reads as follows :—

"All transmissions owing to death of the property, in usufruct

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or enjoyment of, moveable and immoveable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death." The French text reads as follows: "Toute transmission, par décès de propriété, d'usufruit ou de jouissance de biens mobiliers ou immobiliers, situés dans la province est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès." There is no definition of "property," and the remainder of the group of sections and sub-sections relates to the rates of duty, the mode of payment, and the formalities to be gone through in connection with the succession.

Their Lordships are of opinion that no question of difficulty or doubt arises in this part of the case. By the express words of the taxing section the taxation is expressly limited to the property "in the province," or in the French text, "biens . . . . situés dans la province." The meaning of these words is clear. Neither party denies that movable property can be locally situate in a place, and in the present case the property as to which the dispute arises was locally situate in the United States of America, and therefore not in the Province of Quebec. No question arises as to the applicability of the doctrine mobilia sequuntur personam, because the section expressly limited the taxation to property in the province, and therefore whether or not the province possessed and might have exercised a right to tax movable property locally situated outside of the province (such right arising from the domicil of the testatrix) it did not see fit so to do. For the same reason no question of ultra vires arises in this part of the case, since the appellants do not dispute the power of the Quebec Legislature to tax movable property situated in the province.

The cross-appeal of the Crown therefore fails.

There remains the appeal of the appellants. The bulk of the careful and elaborate arguments upon these appeals was devoted to this part of the case. It was distinguished from the case on the cross-appeal by the fact that the legislation in force at the date of the death of Mrs. Cotton had been repealed before the

death of her husband, and the succession duties on the husband's estate were entirely regulated by the terms of an Act passed in 1906, entitled the Quebec Succession Duties Act. In this Act the operative part of the actual taxing section of the former legislation is reproduced with a minute verbal alteration which admittedly makes no difference. But there is inserted in the section a definition which did not appear in any of the former Acts. It reads as follows: "1191c. The word 'property' within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all moveables wherever situate of persons having their domicile (or residing) in the Province of Quebec at the time of their death."

The respondent contends that the presence of this definition extends the operative clause so as to make it cover all movable property possessed by the testator wherever situate. The appellants deny that it has any such effect, and further contend that, if it has such effect, the enactment is thereby rendered ultra vires of the Provincial Legislature, and is of no validity. These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greater practical importance in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the province," so that a decision depending on the presence of those words would have no application to the present state of legislation.

Taking the first of the two questions their Lordships are asked to decide whether the presence of the definition has the effect of removing the words of limitation "in the province" from the

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operative part of the section. It is difficult to see how it can be contended that they have that effect. Under the earlier legislation there was no specific definition of property, and therefore it would be interpreted in its natural sense, i.e., the totality of all that the testator owned whatever its nature and wherever its situation. The specific definition that appears in the later legislation is not and could not be wider than this. It is true that it may indicate that the section is intended to apply to a wider class of owners than would be affected under the former legislation, because it refers to persons not domiciled within the province. Such a breadth of application may perhaps give rise to questions in the future, but they do not arise here. In the case of a person who is domiciled in the province, and who, therefore, is naturally subject to the operative clause (as Henry H. Cotton undoubtedly was), it makes nothing "property" which would not have been considered "property" if no specific definition existed. The same consideration which was decisive in the former case therefore applies with equal force here. By the words of limitation inserted in the operative clause the Legislature makes it clear that it does not intend to tax the whole of the "property" of the deceased, but only those of his goods which are "situés dans la province." It is no longer a question of the powers of the Legislature. Whatever they may be, it has chosen to exercise them only so far as the property locally situated within the province is concerned.

The necessity of this conclusion appears more strikingly when we examine that part of the definition on which the argument for the respondent was exclusively based. Counsel relied on the presence at the end of the definition of the words "all moveables wherever situate of persons having their domicile (or residing) in the Province of Quebec at the time of their death." But the things so referred to would obviously be included in the word "property" as used in the earlier statutes—indeed, they could not be excluded from any concept of the property of the deceased. And, moreover, its presence emphasizes the deliberate use of limiting words in the operative clause. The definition prescribes that "property" includes movables "wherever situate," but the express language of the operative clause provides that of this

"property" those portions only are taxed which are "biens situés dans la province."

An attempt was made to suggest that this definition of "property" could only have been inserted in the Act to indicate that on which it was the intention to levy the duties, and that therefore the operative clause must be read as co-extensive with the definition. But apart from the fact that the language of the operative clause is fatal to this argument, the group of clauses itself shews a good reason for inserting a definition of property wide enough to cover all that the testator possessed quite independently of the question whether duties should be levied on the whole of the property or not. By the provisions of art. 1191g the executor or some party interested under the will must make a declaration under oath, setting forth, among other things, "the description and real value of all property transmitted." This is a matter of great importance to those who collect the revenue, because they are able to judge for themselves as to the amount of the duties leviable, or, in other words, to perform the duty imposed upon the collector by sub-s. 6, i.e., to prepare "a statement of the duties to be paid by the declarant." Other provisions of the group of clauses illustrate in a similar way the use of the word "property" without any restrictive words in this group of clauses, and fully account for the breadth of the definition without in any way detracting from the force and effect of the limitation which is found in the operative clause.

On the above ground, therefore, their Lordships are of opinion that this appeal must be allowed.

There is, however, as has been already pointed out, a second question in the case, the decision of which in favour of the appellants would lead to the same result. This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the Provincial Legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, "in the province," have been deleted from that clause. Their Lordships have to decide whether an enactment in such a form

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would be within the powers of the Provincial Legislature by reason of the taxation imposed by it being "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the meaning of s. 92 of the British North America Act, 1867.

The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of our colonies is concerned; and although all the authors of standard treatises on the subject recognized the existence of the two types of taxation, there cannot be said to have existed any recognized definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But so long as the terms were only used in connection with the theoretical treatment of the subject this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. "Direct taxation" is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should for the purposes of that statute ascertain and define the meaning of the phrase as used in such legislation.

Numerous cases were quoted to us in which the question has been dealt with by this Board. The earliest of these cases occurred in 1884, namely, *The Attorney-General for Quebec* v. *Reed* (1), in which the opinion of this Board was delivered by the Earl of Selborne L.C. The Act in question in that case was an Act imposing a duty of ten cents upon every exhibit filed in Court in any action. The funds so raised were intended to pass into the general revenue of the province, and their Lordships held that such an impost came precisely within the words "taxation

(1) 10 App. Cas. 141.

in order to the raising of a revenue for provincial purposes." The sole remaining question, therefore, was whether such taxation was "direct," and his Lordship, in delivering the opinion of the Board, says as follows: "Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellants' arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—'one which is demanded from the very persons who it is intended or desired should pay it.' And then, the converse definition of indirect taxes is, 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.'"

Applying this definition, he pronounces that a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice is not one which is demanded from the very persons whom it is intended or desired should pay it, and that, therefore, the taxation in question was not "direct." The Act was accordingly held to be ultra vires.

The question next came before this Board in the year 1887 in the case of *Bank of Toronto* v. *Lambe*. (1) The Quebec Legislature had in the year 1882 passed an Act levying a tax upon every bank carrying on the business of banking in the province. The amount of the tax depended upon the paid-up capital and the number of offices or places of business of the bank, and it was contended by the appellant that such a tax was not a direct tax. In the argument in that case counsel for the appellant quoted the following definition taken from the well-known treatise of John Stuart Mill as the one he would prefer to abide by:—

"Taxes are either direct or indirect. A direct tax is one

(1) 12 App. Cas. 575.

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which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

In delivering the judgment of this Board, Lord Hobhouse says as follows: "Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, not only because it is that of an eminent writer, not with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act."

The taxation was held to come within the above definition of a direct tax, and accordingly the Act was held to be intra vires and valid.

In the year 1897 the same question came before this Board in a very similar case—*Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario.* (1) The question in this case was as to whether an Act requiring brewers and distillers in the Province of Ontario to take out licences was ultra vires of the provincial Legislature. Lord Herschell, in delivering the opinion of the Board, treated the question as being settled by the decision in *Bank of Toronto* v. *Lambe* (2), and referring to the decision in that case he says:

"Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the

(1) [1897] A. C. 231. (2) 12 App. Cas. 575.

same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

"The definition referred to is in the following terms: 'A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.' In the present case, as in *Lambe's Case* (1), their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person."

Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase "direct taxation" in s. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion. It remains to consider whether the succession duty imposed in the present case would be within this definition if it be taken that the duty is imposed on all the property of the testator, wherever situate.

For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of "property" contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province. This succession duty varies with the amount of the property

(1) 12 App. Cas. 575.

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and the degree of consanguinity of the persons to whom it is transmitted. The method of collection appears to be as follows: There is nothing corresponding to probate in the English sense, but there is (under art. 1191g) an obligation on "every heir, universal legatee, legatee by general or particular title, executor, trustee and administrator or notary before whom a will has been executed" to forward within a specified time to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that "the declaration duly made by one of the above-named persons relieves the others as regards such declaration." On receipt of such declaration the following provisions of the above article with regard to the payment of the duty come into force:—

"(4.) . . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

"(5.) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid, by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any Court of competent jurisdiction in his own district.

"(6.) No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid."

Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration, who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein.

To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden but to be recouped by some one else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial Legislature it is by no means the only one. Indeed, the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government as in the cases where local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not "direct taxation," and that the enactment is therefore ultra vires on the part of the Provincial Government. On this ground, therefore, the appeal must be allowed.

Much of the argument before their Lordships related to the cases of *Harding* v. *Commissioners of Stamps for Queensland* (1),

(1) [1898] A. C. 769.

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Lambe v. *Manuel* (1), *Rex* v. *Lovitt* (2), and *Woodruff* v. *Attorney-General for Ontario.* (3)

Their Lordships are of opinion that the discussion of these cases is not necessary for the decision of the present case. *Harding* v. *Commissioners of Stamps for Queensland* (4) related solely to the interpretation of the Queensland Succession and Probate Duties Act, 1892, and throws no light on the questions involved in the present case. *Lambe* v. *Manuel* (1) decided nothing farther than that the Quebec Succession Duty Act of 1892 applied only to property which a successor claims under and by virtue of Quebec law, and this also is not in issue in the present case. In the case of *Rex* v. *Lovitt* (2) no question arose as to the power of a province to levy succession duty on property situated outside the province. It related solely to the power of a province to require as a condition for local probate on property within the province that a succession duty should be paid thereon. The decision in the case of *Woodruff* v. *Attorney-General for Ontario* (3) was much relied upon on behalf of the appellants, but the circumstances of the case were so special, and there is so much doubt as to the reasoning on which the decision was based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision, and they have accordingly decided the present case entirely independently of that decision.

Their Lordships will, therefore, humbly advise His Majesty that the appeal of Charles S. Cotton and another be allowed and the cross-appeal of the Crown dismissed. This is equivalent to directing that the decision of the Court of King's Bench (Appeal side) be restored. The respondent to the principal appeal will pay the costs of the appeal to the Supreme Court of Canada and of these appeals.

Solicitors for appellants: *Capel Cure & Ball.*
Solicitors for respondent: *Charles Russell & Co.*

(1) [1903] A. C. 68.
(2) [1912] A. C. 212,
(3) [1908] A. C. 508.
(4) [1898] A. C. 769,

[PRIVY COUNCIL.]

EASTERN CONSTRUCTION COMPANY, LIMITED . . . . . } APPELLANTS;

AND

(1.) NATIONAL TRUST COMPANY, LIMITED AND OTHERS . . . . . } RESPONDENTS;
(2.) THERESE SCHMIDT AND OTHERS . . }

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . . } INTERVENANT.

J. C.* 1913 *July* 24, 25, 28; *Oct.* 21.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Trover and Detinue—Jus tertii—Timber Rights in Crown Mining Lands—Independent Contractors—Defendants receiving Benefit of Trespass—Ratification—Crown Timber Act (*R. S. O.*, 1897, *c.* 32), *ss.* 1 *and* 2—*Mines Act* (*R. S. O.*, 1897, *c.* 36), *ss.* 39 *and* 40.

The respondents respectively held a patent and a lease from the Crown of mining lands in Ontario. Under the Mines Act (R. S. O., 1897, c. 36), ss. 39 and 40, the property in all pine trees on lands the subject of a patent or a lease is reserved to the Crown, who may grant licences to cut them, the patentee or lessee having, however, the right to cut them for use for mining purposes and in clearing the ground for cultivation. The appellants, who had a licence from the Crown under the Crown Timber Act (R. S. O., 1897, c. 32) to cut timber upon specified lands, not including the lands held by the respondents, contracted with a firm of cutters to cut timber upon the lands so specified, to manufacture it into railway ties, and to deliver the ties in performance of a contract which the appellants held. The firm, without the knowledge of the appellants, in February, 1909, wrongfully entered upon the respondents' lands, cut pine trees thereon, manufactured ties, and proceeded to deliver them according to their contract. On February 24, 1909, when ordered by the Crown Timber Agent to desist, they had removed all but a few of the ties. On March 6, 1909, the Crown gave permission to the appellants to remove the remaining ties, and subsequently charged them the usual dues in respect of all timber cut by the firm, including the pine trees cut upon the respondents' lands. The respondents did not demand the return of the ties:—

Held, (1.) that the property in the pine trees continued in the Crown after they were cut, and that the respondents, if they had possession, were

* *Present:* LORD ATKINSON, LORD MOULTON, and LORD PARKER OF WADDINGTON.

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merely bailees for the Crown and could not maintain actions in trover or in detinue against the appellants, who were entitled to rely upon the title of the Crown.

(2.) That the firm were not the servants or agents of the appellants, and that the latter were not by reason of having received the benefit of the pine trees cut liable in trespass for the acts committed by them.

CONSOLIDATED APPEALS, by special leave, from judgments of the Supreme Court (March 21, 1912) reversing, by a majority, judgments of the Court of Appeal for Ontario (April 1, 1911), and restoring, with a variation, the judgments of Clute J. (June 17, 1910).

The facts which gave rise to the litigation are fully stated in the judgment of their Lordships, and those material to the pine trees, with regard to which alone substantial questions of law arose, are shortly stated in the head-note. The provisions of the Mines Act (R. S. O., 1897, c. 36), ss. 39 and 40, with regard to the rights of the Crown and of the holders of patents and leases in pine trees upon lands the subject of patents and leases are set out at pp. 51 and 52 of the judgment. The right of the Crown to grant licences to cut timber on ungranted lands is provided for by the Crown Timber Act (R. S. O., 1897, c. 32), ss. 2 and 3. The above-named respondents, the holders of a patent and of a lease respectively, on July 26, 1909, commenced two actions each against the appellants, the Eastern Construction Company, Limited, and the firm of Miller and Dickson. The relief claimed in each action was damages for "trespass and wrongs complained of" and for an injunction, and by an amendment, which was taken as having been made, for damages for conversion. The trial took place on June 15, 16, and 17, 1910, before Clute J. without a jury, who held that the appellants did not authorize the trespasses committed by the cutters, Miller and Dickson, but that having accepted and sold the ties they were liable in damages equally with that firm. The learned judge was of opinion that, there being interests and rights given with the lands to the patentees and lessees, they were in possession of the timber when cut, and that trespassers could not rely upon the rights of the Crown. He found as a fact that, though no mining or clearing had been done by the plaintiffs, the timber upon their lands respectively was not more than sufficient for mining purposes

thereon. Judgment was entered for the plaintiffs (respondents) based upon the value of the timber cut. The appellants and Miller and Dickson appealed to the Court of Appeal for Ontario. That Court (Moss C.J.O., Garrow, Maclaren, Meredith, and Magee JJ.A.) by its judgment delivered by Meredith J.A. on April 1, 1911, held that the plaintiffs had no title in the pine trees which enabled them to maintain the actions in respect of them.

The plaintiffs (respondents) appealed to the Supreme Court, which on March 21, 1911, by a majority of three (Fitzpatrick C.J., Anglin J., and Brodeur J.) to two (Idington J. and Duff J.), reversed this decision of the Court of Appeal. The judgment of the majority of the Court, delivered by Anglin J., was to the effect that that Court was bound by the decision in *Casselman* v. *Hersey* (1), in which it had been held that the value of pine trees removed from land held under a lease could be recovered from the wrong-doer. This decision, the majority held, had acquired legislative authority under the stare decisis doctrine, having regard to subsequent legislation. They also relied on the decision in *Glenwood Lumber Co.* v. *Phillips* (2) as conclusive in the plaintiffs' favour, and held further that the evidence did not establish that the appellants had acquired the rights of the Crown. Idington J. and Duff J. delivered separate dissenting judgments. They were of opinion that both the above decisions were distinguishable, that the stare decisis doctrine was not applicable to the former, and that the plaintiffs had no property in the pine trees to support the action. In the result the appeal was allowed and the judgments of Clute J. restored with a variation. It was declared that the appellants were equally liable in damages with Miller and Dickson, and the cases were referred to a Master to ascertain what damages the plaintiffs were entitled to recover.

On July 25, 1912, the appellants applied for and obtained special leave to appeal, and the Attorney-General intervened.

R. C. Smith, K.C., and *J. H. Moss, K.C.*, for the appellants. The property in the pine trees was reserved to the Crown under

(1) (1872) 32 Upper Can. Q. B. 333. (2) [1904] A. C. 405.

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the Mines Act, 1897, ss. 39 and 40, and, both upon the construction of the former section and upon the authorities, it remained in the Crown after they had been cut. The plaintiffs had no property to support the action with regard to them, neither had they actual or constructive possession. The decision in *Glenwood Lumber Co.* v. *Phillips* (1) is distinguishable, as in that case there was no reservation of the Crown rights. The evidence established that the Crown rights were transferred to the appellants. Under the Crown Timber Act, 1897, ss. 19, 20, and 21, the Crown have full powers to deal with timber cut by trespassers. The action was not framed in detinue, and as the return of the ties was never demanded no action in conversion could lie, even if there was a conversion in respect of the ties removed before the Crown rights were acquired. The application of the stare decisis doctrine is excluded by the Interpretation Act (R. S. O., 1897, c. 1), s. 8, sub-s. 57. It is not material that there was no similar section in the Interpretation Act in the consolidation in 1877 or in 1887. The appellants neither committed nor authorized any act of trespass. The firm were independent contractors, and the appellants cannot be held liable for the acts of the firm because they received the benefit of the ties cut. With regard to the tamarack trees cut the money in Court is more than sufficient to satisfy the claim.

J. S. Ewart, K.C., and *J. A. Macintosh*, for the above-named respondents. By the effect of their patent and lease, taken in conjunction with the Crown Timber Act, 1897, ss. 2 and 3, the respondents were at the time of the trespasses the owners of all trees upon their locations except such pine trees as were not necessary for the purposes referred to in the Mines Act, 1897, ss. 39 and 40, or they at least had a special property in the pine trees under ss. 39 and 40. The trial judge found as a fact that the timber was not more than sufficient for the purposes for which the patentees and lessees were entitled to cut them. Further, when the pine trees were cut and were lying on the respondents' locations they had possession of them. The appellants were liable in trespass and the direction to the Master to ascertain the damages was right. The firm of cutters were

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mere trespassers, and the appellants by their assent and by receiving the benefit of the trespass were equally liable with them for the value of the timber cut. The evidence does not establish that the Crown rights were transferred to the appellants, and it was not pleaded that they had been. The rights of the plaintiffs in respect of the tamarack trees is undisputed.

Hon. M. M. Macnaghten, for the Attorney-General, supported the arguments of the appellants.

No reply was called for.

The judgment of their Lordships was delivered by

LORD ATKINSON. The respondent company, the National Trust Company, for convenience styled the National Company, brought jointly with John Shilton and William Hollaway Wallbridge, on June 26, 1909, an action against the appellant company, the Eastern Construction Company, for convenience styled the Construction Company, William Miller and William Dimmie Dickson, to recover damages for trespassing on their land, cutting down and carrying away certain pine and tamarack trees growing thereon, and injuring the land. The precise relief claimed was (1.) damages for the trespasses and wrongs complained of; (2.) the costs of the action; (3.) an injunction restraining the defendants from a repetition of the acts complained of; and (4.) further relief. The respondents Therese Schmidt and John Shilton brought a similar action against the same defendants to recover damages for similar trespasses and wrongful acts alleged to have been committed on their lands, claiming similar relief. A third party action was instituted by notice by Miller and Dickson against the Construction Company, claiming to be indemnified. Before the trial a notice was served by the plaintiffs in both of the two main actions to the effect that an application would be made at the trial to the presiding judge to amend the statements of claim by alleging that the defendants after felling this timber manufactured it into ties or railway sleepers, and wrongfully converted those ties to their own use. Some discussion took place at the commencement of the trial as to the propriety of making this amendment. No serious objection appears to have been taken to it by the defendants,

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but the matter was deferred and no such amendment was in fact ever made.

The actions were tried before Clute J. without a jury on the pleadings as they stood, and as the evidence in the two main actions was practically identical, and the relief prayed for in the third party action in a great degree was consequential upon the findings in the others, all three were tried together, and resulted in judgment being recovered in the first action against the defendants for the sum of $3157, and in the second for the sum of $1053, with costs in each case, and in the third party action being dismissed; but it having appeared during the course of the proceedings that the Construction Company were indebted to Miller and Dickson in two sums of $1259.28 and $629.65, it was directed that the first of these sums should be paid into Court in the first action, and the second in the second action, in satisfaction pro tanto of the sums recovered in these actions respectively. The trial judge found on other issues of fact to be hereafter referred to.

The defendants appealed in both cases to the Court of Appeal of Ontario. That Court, by its judgment and order dated April 1, 1911, reversed, with some modifications to be hereafter mentioned, the judgments and orders made by the trial judge in both cases. On appeal by the plaintiffs in both suits to the Supreme Court of Canada, that Court, by its orders of March 21, 1912, reversed the decision of the Court of Appeal of Ontario, and held that the two sets of defendants, the Construction Company and Miller and Dickson, were equally liable to the respective plaintiffs for the sums awarded against them by the trial judge in each case for damages, not, however, on the statement of claim as it originally stood, nor yet as it was proposed to be amended, but in detinue in respect of certain pine and tamarack timber cut and removed by Miller and Dickson from the mining locations of the respective plaintiffs. From these two judgments the two appeals, now consolidated, have by special leave been brought to this Board.

The facts so far as material for the decision of this case are as follows: By patent No. 3212, the Crown granted to Herbert Carlyle Hammond, William Hollaway Wallbridge, and John

Shilton, all of the city of Toronto, the fee simple of a certain parcel of land, described as mining locations, situated south of Vermilion River, and north of Minnietakie Lake, in the Rainy River district, to hold to them in undivided thirds, subject, however, amongst other things, "to all the reservations, provisos, and conditions of the Mines Act (R. S. O., 1897, c. 36)," and saving and excepting the reservations and exceptions contained in s. 39 of the said statute, namely, all pine trees standing or being on the said lands as by the said section provided.

By a lease from the Crown bearing date May 11, 1903, styled a mining lease, certain tracts of land therein described, composed of four so-called mining locations, each containing forty acres, situate south of the same river and north of the Minnietakie Lake, were demised to one Carl Schmidt, his executors and assigns, to hold for a period of ten years, with all mines and minerals on or under the same, together with all easements, advantages, and appurtenances, for the purpose of mining upon and under the said lands, at the yearly rent thereby reserved. The lease contained several covenants, conditions, and reservations which, with one exception, are immaterial for the purpose of these appeals. That exception was to the effect that the lease was subject to all the provisions of the Mines Act and any amendments thereof which had been or should be made, and that all pine trees standing or being on the lands were, as provided by ss. 39 and 40 of the Mines Act, reserved to the Crown. No mines have ever been sunk on the lands granted or demised, and no portion of them has been cleared for cultivation. Enough work simply has been done in each location to save the grant and lease respectively from forfeiture.

The lessee, Carl Schmidt, died, and the plaintiffs Therese Schmidt and John Shilton are his administratrix and administrator respectively. Herbert Hammond also died, and the National Company is his executor.

Sects. 39 and 40 of the Mines Act (R. S. O., 1897, c. 36), run as follows:—"39.—(1.) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding

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a license to cut timber or sawlogs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

"(2.) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

"(3.) No pine trees, except for the said necessary building, fencing and fuel, or other purpose essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or sawlogs.

"40. The preceding section shall apply to all leases issued under this Act, other than leases of mining rights hereinafter mentioned, with the following limitations and variations, that is to say:—(1.) No pine trees shall be used for fuel other than dry pine trees, and (except for domestic or household purposes) only after the sanction of the timber licensee or the Department of Crown Lands is obtained."

The Crown, by permit dated October 12, 1908, granted permission to the Construction Company to cut from thence to April 30, 1909, subject to withdrawal if deemed expedient, 200,000 ties or timber railway sleepers on certain lands therein described lying to the north of the Vermilion River, and also permission to remove them when cut, paying to the Crown therefor dues or charges at the rate of ten cents per tie, with a proviso that no timber below eight inches in diameter was to be cut.

On December 31, 1908, the Construction Company entered into a contract with Miller and Dickson, who carry on in partnership in the town of Port Arthur the business of cutters and manufacturers of railway ties, to cut from off a certain defined area,

portion of the lands described in this permit, timber to be manufactured into railway ties. Previously to making this contract the Construction Company had entered into a contract with the firm of O'Brien, Fowler & McDougall Brothers, railway contractors, to supply them at a commission with ties to be so manufactured.

Under the company's permit, Miller and Dickson commenced early in January, 1909, to fell and manufacture into ties timber of the size specified, grown on the land mentioned in their contract, and when manufactured to haul them off the land. They continued to do this up to the beginning of the following month. They then, on their own initiative, and without the authority or knowledge of the Construction Company, crossed over to the south of the Vermilion River, and from thence till February 24 felled upon certain Crown lands, and also upon the lands of both the plaintiffs, certain pine and tamarack trees, manufactured them where they fell into ties, and hauled the ties when manufactured from out of the wood or forest where they were lying. Only a few remained on the lands of the plaintiffs after February 24, 1909. When hauled out the ties were delivered, on behalf of the Construction Company, to the railway contractors by the side of the portion or branch of the transcontinental railway the latter were in the course of constructing. The ties were then counted and stamped by the employees of the railway, and piled up with others brought from elsewhere. On that day, February 24, 1909, Messrs. Shilton, Wallbridge & Co., the legal advisers of the plaintiffs, wrote to Dickson and Miller a letter complaining of these undoubted trespasses on the land of their clients. On the same day, one James Smith, Crown timber ranger, acting under the instructions of Mr. William Margach, Crown timber agent for the Rainy River district, wrote to Messrs. Dickson and Miller a letter informing them that the permit issued to the Construction Company did not authorize the cutting of timber south or east of the Vermilion River, and requiring them to desist from cutting it. On the same day, also, Dickson and Miller sent to Mr. Margach an application for a permit to make 15,000 ties on territory lying east of Vermilion

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River and on the G. T. P. block No. 9, south of Pelican Lake. This application was ultimately refused. Mr. Margach visited the land in company with Smith, and, as it clearly appears from his cross-examination, was on February 26 fully informed that Dickson and Miller had not only cut timber on the Crown lands, but had also cut it on the locations of the plaintiffs. He wrote on March 6, 1909, to the Construction Company the following letter:—"Your contractors, Dickson and Miller, applied for a permit to cut timber south of Vermilion River, being territory lying to the south of your permit. Dickson and Miller cut quite a quantity of jack-pine and tamarack, and when I visited their camp I stopped them cutting; they then made application for a permit, but the Department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it."

He stated in his evidence that the Government made no claim against Miller and Dickson in respect of the timber cut either on the Crown lands or on the locations, but that the Government did make a claim against the Construction Company for the ordinary dues in respect of all the timber so cut. He also said he made the return to the Government of the amount of timber cut by Dickson and Miller, both on the Crown lands and on the mining locations, that upon this return the accounts against the Construction Company were made up in Toronto and sent to him for collection, and that the ordinary dues alone were demanded. This letter of March 6 was the first intimation the Construction Company received of the trespasses committed by Miller and Dickson, and it is, in their Lordships' view, perfectly clear that the Crown by that letter consented to the appropriation by the company for their own purposes of all the ties so cut and manufactured on the two mining locations of the plaintiffs.

The statement of claim contained a paragraph to the effect that it was the intention of each of the plaintiffs to open, work, and develop mines on these locations, that the timber cut was necessary for use in these mining operations, and that by the cutting and removal of it the locations were depreciated in value. In reference to this paragraph, the learned trial judge found as a fact that the timber growing on each of the mining locations

of the plaintiffs before the trespasses complained of were committed would not have been sufficient for the requirements of any mines, properly so called, which might thereafter be made and worked upon the respective locations, and that the timber would be more valuable for the purposes of the mines than for ties. The loss alleged to be thus sustained by the plaintiffs was apparently taken into account in measuring the damages awarded for trespass.

The learned judge stated the grounds upon which he held the Construction Company liable for these damages in the following passage of his judgment:—"I think Miller and Dickson crossed the line and cut those ties, and that that cutting was afterwards brought to the attention of the Eastern Construction Company, and they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor, and I can draw no distinction between their liability therefor and the liability of Miller and Dickson for the trespasses that have been committed."

The construction he put upon ss. 39 and 40 of the Mines Act, coupled with the contents of the patent grant and lease, is stated in the following passage of his judgment:—"The meaning of the statute is that, while the property remained in the Crown, so that if this timber was in fact required for mining purposes, or for building purposes, or for other uses to which the patentee or lessee had a right to apply the timber, that then the Crown, in case the timber were taken off the place, either under a permit by the Crown or sold by the authority of the patentee, would have no difficulty in recovering the proper dues for the timber."

Mr. Ewart, who appeared for the respondents, did not defend the judgment appealed from as a judgment in detinue. He urged that the decision was right but the grounds on which it was based were erroneous, and contended that it was open to him to insist that the decision of the trial judge was right and should have been upheld by the Supreme Court of Canada, either on the pleadings as they stood, or as amended in the way proposed in the notice of June 17 already referred to, and should now be upheld by their Lordships. It is better for the purpose of this

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appeal to assume that the pleadings were amended in the manner proposed.

Under these circumstances the primary question for consideration appears to their Lordships to be the nature and extent of the right of the Crown to the pine trees growing, or to grow, on the mining locations of the plaintiffs under the patent and lease respectively granted to them. When one turns to ss. 39 and 40 of the Mines Act, one finds that by sub-s. 1 of s. 39, made applicable to leases by s. 40, it is expressly enacted that patents for all Crown lands sold or granted shall contain a reservation of all pine trees standing or being thereon, and that these pine trees shall continue to be the property of Her Majesty. Duff J., in his able and convincing judgment, cited the three following cases, namely, *Herlakenden's Case* (1), in which it was held that if trees be excepted in a feoffment to a man and his heirs, the trees in property are divided from the land, though in fact they remain annexed to it, and that if one should cut them down and carry them away it would not be felony. Secondly, *Liford's Case* (2), in which it was decided, amongst other things, that where a lease is made of land for a term of years, the lessee has but a special interest in the trees, as to "have the mast and fruit of the trees and shade for his cattle," but that the inheritance of the trees was in the lessor; and thirdly, *Raymond* v. *Fitch* (3), in which it was decided that a covenant by the lessee not to cut timber excepted from the demise was collateral and did not run with the land, no more than would a covenant not to cut trees on land of the lessor than that demised.

It appears to their Lordships that, according to the only construction of which these instruments are reasonably susceptible, the property in the pine trees growing on these locations remained in the Crown. Indeed, this point was scarcely contested by Mr. Ewart. He did contend, however, that the proprietary right of the Crown was limited in two directions, first, by the provisions of s. 2 of the Crown Timber Act (R. S. O., 1897, c. 32), passed in the same session of Parliament as the

(1) (1589) 4 Rep. 62a. (2) (1614) 11 Rep. 46b.
(3) (1835) 2 C. M. & R. 588.

Mines Act; and, secondly, by the provisions of the latter Act itself, conferring as they do on the patentee and lessee respectively the right to cut timber for mines, &c., and amounting, when coupled with the finding of the trial judge as to the bare sufficiency of the supply for these last-named purposes, to a prohibition against the giving by the Crown of any licence or authority to cut for other purposes any of the pine trees growing on these locations. As to the first point, s. 2 of the Timber Act plainly applies only to licences about to be granted to cut timber on lands which are not at that time the subject of a grant to any one, but which are in the possession of the Crown. As to the second, it may well be that, having regard to the finding of the learned trial judge, if licences were granted by the Crown to cut this timber, the patentee or lessee, as the case might be, might have a right to recover by petition of right from the Crown damages in respect of the injury thus done to their respective mining locations. It is not necessary in this case to decide that point. But even if the effect on the rights and powers of the Crown were such as is contended for, it is a wholly different proposition that the property in the pine trees when felled even by a trespasser would not belong to the Crown. In the opinion of their Lordships it is perfectly clear that the pine trees when felled were, in this case, the property of the Crown. It may well be doubted if in truth and fact the timber felled ever passed out of the possession of the servants of Miller and Dickson into that of the plaintiffs. Taking the view, however, of the facts most favourable to the plaintiffs, namely, that it did so pass, the plaintiffs could only have had possession of it as the bailees of the Crown. No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller and Dickson, and possibly from the Construction Company, the full value of the timber felled, as well as any special damage they might themselves have sustained by reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary right in, or title to, the property in the trees or in the ties into which they were manufactured, but because, to use the words of Lord Campbell in *Jeffries* v. *Great Western Ry.*

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Co. (1), as "against a wrong-doer possession is title." That is no new doctrine. It was decided in 1721 in *Armory* v. *Delamirie* (2) "that the finder of a jewell though he does not by such finding acquire an absolute property or ownership yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the case of *The Winkfield.* (3) Both this case and the case of *Jeffries* v. *Great Western Ry. Co.* (1) were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Glenwood Lumber Co.* v. *Phillips* (4), and it must be now taken as conclusively established. But it would be against all notions of justice that the bailee who recovers the full value of the goods wrongfully taken out of his possession should be able to retain it for himself. The goods were not his, they belonged to the bailor. The money recovered under the judgment represents and is substituted for the goods themselves. To allow the bailee to keep it for himself would be to compensate him in damages for a loss he has never suffered; and accordingly it was decided in *Turner* v. *Hardcastle* (5), and approved of in the judgment in *The Winkfield* (3), that the bailee who in such circumstances recovers the full value of the goods must account to the bailor for the sum recovered. In *Nicholls* v. *Bastard* (6) Parke B. said no doubt the bailor may recover as well as the bailee, "and whichever first obtains damages is a full satisfaction." These being the rights and obligation of the bailee, it is obvious that if, before action brought by him against the wrong-doer, the bailor has clothed that wrong-doer with the ownership of the goods, the bailee cannot recover from the wrong-doer, thus converted into the true owner, the full value of the goods, no more than he could recover their full value from the bailor himself. In such an action the defendant would not be setting up a jus tertii, but, as donee or assignee of the tertius, a jus sui. Lord Collins, the

(1) (1856) 5 E. & B. 802, at p. 805.
(2) (1721) 1 Str. 504; 1 Sm. L. C., 11th ed. 356.
(3) [1902] P. 42.
(4) [1904] A. C. 405, at p. 410.
(5) (1862) 11 C. B. (N.S.) 683.
(6) (1835) 2 C. M. & R. 659, at p. 660.

Master of the Rolls, as he then was, was careful to point out this qualification of the bailee's rights in his judgment in *The Winkfield* (1); he says: "It seems to me that the position that possession is good against a wrong-doer, and that the latter cannot set up a jus tertii unless he claims under it, is well established in our law." But the appellants in the present case contend that they claim under the jus tertii, and if that contention be sustained there is an end to the plaintiffs' right to recover in trover or detinue. It was insisted by Mr. Ewart that this point is not raised in the defence. This is a strange objection to make, since the statement of claim as it stood at the trial did not contain any claim in trover or detinue. It was framed solely in trespass, to which a plea that the plaintiffs were only bailees of the felled timber, and that before action brought the Construction Company had acquired from the bailor, by donation or assignment, the full ownership of and property in the timber, would have been no answer whatever. The proper time to put in such a defence was when the statement of claim was amended by the addition of a claim in trover or detinue. The matter was fully dealt with at the trial. A large body of evidence was given on the very point, necessarily on the assumption that the statement of claim had been amended as required by the notice of June 7, 1910. It seems rather unreasonable upon the part of the respondents, while they contend that the statement of claim should be taken as amended in the manner proposed, to insist that the statement of defence should not be taken as having been amended, by the insertion of a plea to the new cause of action, to which in effect much of the evidence at the trial was directed. Their Lordships do not think there is anything in this point.

Next it is contended that the letter of March 6, 1909, from Mr. Margach to the Construction Company, upon which this question turns, did not refer to the timber cut on the plaintiffs' locations, further, that Margach had no authority to write it, and, lastly, that his action was not adopted by the officers of State acting on behalf of the Crown whose agent the writer was and on behalf of whom he obviously professed to act. [Their

(1) [1902] P. 42, at p. 54.

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Lordships, after considering the evidence given by William Margach, Crown timber agent, and of James Smith, Crown timber ranger, continued:] It appears to their Lordships that upon this evidence it is clear to demonstration that Margach's letter of March 6, 1909, referred to the timber cut on the plaintiffs' locations, and that the proper department of the Ontario Government, charged on behalf of the Crown with the duty of the granting of permits, the exercise of lumber rights under them, and the general supervision and administration of such affairs, either expressly authorized beforehand the writing of this letter by their accredited officer purporting to act in his official capacity on their behalf, or adopted and acted upon it in every respect. The legal result is this, that no demand having been made by the plaintiffs for a return of the timber, there necessarily was no refusal by the defendants to return it—(an important matter, *Clayton* v. *Le Roy* (1))—the conversion must therefore necessarily have taken place, if it took place at all, when the timber was taken from the location in its manufactured state, and immediately after if not before it took place, the Crown, the bailor, had consented to the Construction Company's retaining the timber as their own, and appropriating it, as its owners, to their own purposes.

The plaintiffs' claim for damages in trover or detinue cannot in their Lordships' opinion, be sustained. The guarded letter of Mr. Aubrey White, Deputy Minister, dated March 18, 1909, addressed to Messrs. Shilton, Wallbridge & Co. in no way conflicts with this conclusion.

Then there remains the question as to the adoption by the Construction Company of the action of Miller and Dickson in trespassing on the plaintiffs' location. There are many answers to the plaintiffs' contention on this point. In the first place Miller and Dickson were not the servants or agents of the Construction Company. They were independent contractors. That point was relied upon in the letter of the Construction Company to the solicitors of the plaintiffs, dated June 11, 1909, and it is quite clear from the terms of the agreement in writing entered into between the Construction Company and these gentlemen

(1) [1911] 2 K. B. 1031.

that this was the true relation between them. Next it is essential to constitute an agency by ratification that the agent in doing the act to be ratified shall not be acting for himself, but should intend to bind a principal actually named or ascertainable: *Keighley, Maxsted & Co.* v. *Durant* (1). In *Wilson* v. *Barker and Mitchell* (2) it was held by Littledale, Parke, and Patteson JJ., in effect, that if A. wrongfully seizes a chattel for his own use B. cannot ratify the act. No doubt ultimately the severed timber, when manufactured and delivered by Miller and Dickson for the use of the Construction Company, would come to that company as a consequence of the tortious acts of the former, but they would be entitled to hold it, not by virtue of those tortious acts, but by virtue of the assignment or donation of the Crown. The doing of the acts furnished, no doubt, the occasion for the exercise by the Crown of its bounty, but in the absence of evidence to the contrary it is not to be presumed that in using this timber as their own the company were taking advantage of these tortious acts rather than taking advantage of the bounty of the Crown, or, in other words, that they had elected to rely on a wrongful rather than a rightful title. Again, ratification must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts. It is quite clear from the correspondence that down to June 11, 1909, the Construction Company had not full knowledge of the precise place where these logs were cut, or of the details of the alleged trespasses. And upon that date, as already pointed out, they informed the plaintiffs that Miller and Dickson were sub-contractors for whose actions they were in no way responsible. Their Lordships are therefore of opinion that there was no evidence before the trial judge upon which it could be reasonably or justly held that the Construction Company had adopted the trespasses which Miller and Dickson are alleged to have committed, or were in any way responsible for them. There is some difficulty about the tamarack trees. Those felled upon the patentees' locations were not reserved to the Crown, and on severance did not become the property of the Crown, and in respect of these the Construction Company would be answerable in trover.

(1) [1901] A. C. 240. (2) (1833) 4 B. & Ad. 614.

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With those felled upon the lessees' location it may be different, but it is not easy to distinguish the one case from the other. The money paid into Court is, however, ample to meet the claim in respect of these trees. Their Lordships are of opinion that the decision appealed from and the judgments and orders of the trial judge are erroneous, and, save as to the tamarack trees, should be reversed, and this appeal should be allowed with costs. They think, however, that, having regard to what took place on the motion for special leave to appeal, the plaintiffs should pay the defendants' costs of the appeal to the Court of Appeal of Ontario, but should be declared to be entitled to recover the costs of the trial on the terms that they do not make any further claim against the Construction Company in reference to the tamarack trees, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for above-named respondents: *Armitage, Chappel & Macnaghten.*

Solicitors for intervenant: *Blake & Redden.*

[PRIVY COUNCIL.]

JAMES H. KENNEDY . . . . . APPELLANT;

AND

DAVID KENNEDY AND OTHERS . . . . . RESPONDENTS.

J. C.*
1913
July 29;
Aug. 1.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO. (APPELLATE DIVISION.)

Will — Bequest to maintain Residence — Indefinite Period — Remoteness — Perpetuity.

A testator by his will appointed his son (the appellant) and his two granddaughters as executors and trustees, and devised a dwelling-house and its contents to the appellant subject to each of his said granddaughters being entitled to live therein as a home until she married. The will, after other devises and bequests, bequeathed the residue of the estate to the trustees to be used by them in maintaining the house and premises. It gave them power to make sales of any real estate, the proceeds to be devoted "to maintain my said residence in the manner in which it has been heretofore maintained"; and it further provided that if it should be necessary to sell the house, the residuary estate then remaining was to be equally divided among the several pecuniary legatees under the will:—

Held, that the trust constituted by the will offended against the perpetuity rule and was void.

APPEAL from a judgment of the Supreme Court (January 15, 1913) affirming a judgment of Teetzel J. (March 28, 1912).

The action was brought by the respondent David Kennedy, the defendants being the appellant and the respondents other than David Kennedy. The plaintiff by his statement of claim prayed that the true construction of the will of David Kennedy, father of the appellant and of other respondents, might be declared by the Court, and for other relief. The testator David Kennedy, who was the father of the said respondent David Kennedy and of the appellant James H. Kennedy, died on February 17, 1906. By his will dated July 4, 1903, he appointed his son James H. Kennedy (the appellant) and his two granddaughters Gertrude Foxwell and Annie Hamilton to be executors and trustees, and he devised to the appellant a dwelling-house and premises in

* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

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Toronto together with the chattels therein, but subject to a provision in favour of each of the testator's said granddaughters that she should be entitled to live in the said residence as a home as long as she should remain unmarried and to occupy the room she then occupied, and this was expressly made a charge upon the premises. The will, which contained other devises and bequests in favour of the testator's other children and grandchildren, concluded with a clause which, omitting immaterial words, read as follows: "The residue of my estate I devise and bequeath to my executors and trustees aforesaid to be used by them, in their discretion or in the discretion of a majority of them, so far as it may go, to the maintenance of the house and premises herein bequeathed to my son James H. Kennedy with power to make sales of any real estate . . . . and the proceeds of such sales to devote, as in their discretion or in the discretion of a majority of them may seem meet and necessary, to maintain my said residence in the manner in which it has been heretofore maintained, and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will." The will was proved by the appellant alone and he became sole executor and trustee thereunder. Previously to the present action, namely, on September 30, 1908, Joseph Kennedy, a son of the testator, to whom he had devised a farm known as Foxwell Estate for his life, commenced an action against the appellant and all the beneficiaries under the will and the next of kin, alleging (as was the case) that the said bequest in his favour had failed, and claiming, among other relief, to have the said will interpreted and the rights and interests of all parties to the action declared. By his statement of claim in this action the plaintiff therein raised the question whether the clause above set out was not void for vagueness, but he did not claim that it was bad for remoteness. This action was dismissed on the ground that the plaintiff had not any title to maintain it at that time.

On September 26, 1910, the appellant as executor and trustee made a contract to sell a large part of the residue for $97,000.

On March 2, 1911, the present action was commenced in the High Court of Ontario by the respondent David Kennedy claiming as heir-at-law of his late father. He submitted, among other matters, the following question for the decision of the Court: "Is the devise of the said residue for the purpose of maintaining and keeping up the house and premises bequeathed to the defendant James H. Kennedy void for remoteness?"

By his judgment delivered on March 28, 1912, Teetzel J. held that the effect of the clause was to tie up the residue for an indefinite time for the purpose of the maintenance of the house and that the gift infringed the rule against perpetuities and was void.

On appeal to the Supreme Court of Ontario (Appellate side) that Court by a majority, consisting of Garrow, Maclaren, and Magee JJ.A., dismissed the appeal, holding that the gift contravened the rule against perpetuities; they also held that the parties were not estopped by the judgment dismissing the action brought by Joseph Kennedy against the appellant and others. Meredith J.A. dissented as to the first point on the ground that if there was an ambiguity in the clause it should be interpreted so that effect might be given to the words, and he held that it should be construed as meaning that the residue was to be applied to the maintenance of the house during the lives of the appellant and the granddaughters and the survivor of them, and that it consequently was valid.

E. D. Armour, K.C., and *A. D. Armour*, for the appellant. The judgment in favour of the appellant in the action brought by Joseph Kennedy renders the present question res judicata and estops the respondents. The claim in that action was as next of kin, and as an intestacy was claimed the validity of the residuary disposition was involved: *Greathead* v. *Bromley* (1); *Reichel* v. *Magrath* (2); *Badar Bee* v. *Habib Merican Noordin* (3); *Lemm* v. *Mitchell.* (4) Upon the true construction of the residuary disposition the trust is for the benefit of the appellant and the two granddaughters and comes to an end upon the

(1) (1798) 7 T. R. 455.
(2) (1889) 14 App. Cas. 665.
(3) [1909] A. C. 615.
(4) [1912] A. C. 400.

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death of the last survivor. It is therefore not void as tending to a perpetuity. If that is not the true construction of the clause the disposition constituted an imperative trust, vesting in the beneficiary immediately after the will became effective, and the fact that the money will last an indefinite time does not render the clause invalid: *In re Wise.* (1) [*Wainwright* v. *Miller* (2) and Lewis on Perpetuity, pp. 213, 652, were also referred to.] The case is similar to *In re Clarke* (3), in which a bequest to the committee for the time being of an institution to be applied, according to the committee's discretion, for the benefit of the institution was held not to be void for remoteness. The decisions in *Thomson* v. *Shakespear* (4) and *Yeap Cheah Neo* v. *Ong Cheng Neo* (5) are distinguishable, for under the disposition in the present case the capital fund as well as the income can be applied to the purpose of the trust.

Buckmaster, K.C., and *M. L. Gordon*, for the respondents other than E. W. J. Owens and Madeleine Kennedy. There is no estoppel by res judicata. The point as to remoteness was not discussed in the former action, which was dismissed on other grounds. The circumstances are therefore not within the dictum of Willes J. in *Langmead* v. *Maple.* (6) The residuary disposition infringes the rule against perpetuities and is void. Upon the true construction it is a bequest to maintain the house not merely during the lives of the appellant and the granddaughters, but for an indefinite period. Nobody could make a title to the trust fund and claim a division within the time allowed. The bequest is until the sale of the house, which may be beyond the limit. [*In re Clarke* (3) was referred to.]

The other respondents did not appear.

Armour, K.C., replied.

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The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The testator David Kennedy by his will dated June 4, 1903, appointed his son, the present

(1) [1896] 1 Ch. 281.
(2) [1897] 2 Ch. 255.
(3) [1901] 2 Ch. 110.
(4) (1860) 1 D. F. & J. 399.
(5) (1875) L. R. 6 P. C. 381.
(6) (1865) 18 C. B. (N.S.) 255, at p. 270.

appellant, Annie Maud Hamilton, and his granddaughter Gertrude Maud Foxwell (thereinafter called his trustees) to be his executor and executrixes, and he devised to the appellant his dwelling-house and premises therein mentioned, subject nevertheless to the provision thereinafter contained for the benefit of Annie Maud Hamilton and Gertrude Maud Foxwell. By this provision each of these ladies was to be entitled to live in the dwelling-house as her home and to occupy a room therein for her life, and was also to be entitled to all necessary maintenance and board, which the testator made a charge on the premises. The testator also gave an annuity and various pecuniary legacies and devised and bequeathed his residuary estate both real and personal to his executor, executrixes, and trustees aforesaid, to be used and employed by them in their discretion or in the discretion of the majority of them so far as it might go in the maintenance and keeping up of his said dwelling-house and premises thereinbefore given to the appellant, with full power to sell the real estate and devote the proceeds to keeping up and maintaining his said residence in the manner in which it had been theretofore kept up and maintained, and if for any reason it should be necessary that the said residence should be sold, the testator directed that upon such sale being completed the residuary estate then remaining should be divided in equal proportions among the pecuniary legatees under his will.

The chief question now arising for decision is whether any definite limit can be assigned to the duration of the discretionary trust affecting the testator's residue. If no such limit can be assigned the trust is void as offending against the perpetuity rule. Their Lordships are of opinion that no such limit can be assigned. It was suggested in the Court below that according to the true construction of the will the discretionary trust is exercisable only by the three persons, or a majority of the three persons, by the will appointed to be the testator's executor, executrixes, and trustees, and could therefore not be exercised beyond lives in being. This suggestion was not pressed before their Lordships' Board, and indeed it is, in their Lordships' opinion, fairly obvious that the discretionary trust is not vested

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in different persons, but in the holders for the time being of a definite office. (See *In re Smith* (1).) The argument relied on before their Lordships was to the effect that, according to the true construction of the will, the trust was for the benefit only of the appellant and the two ladies who were entitled to use the dwelling-house as their home, and therefore could only be exercised during the lives of those persons or the lives or life of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine, as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances, their Lordships are of opinion that the trust offends against the perpetuity rule and is void. (See *In re Clarke* (2), *In re Blew* (3), and *In re De Sommery* (4).)

The appellant also contended that the respondents were all of them estopped from setting up the invalidity of the discretionary trust by reason of the judgment in the action of *Kennedy* v. *Kennedy* referred to in the appellant's case. In that action there was some suggestion that the discretionary trust was void for uncertainty, but the point, obvious though it was, as to the effect of the perpetuity rule, appears for some reason to have passed unnoticed. Moreover, the plaintiff in that action based his claim upon the interest which he claimed under the will, and not upon his title as next of kin or otherwise against the will. Under these circumstances their Lordships are of opinion that there is no such estoppel as alleged. The appeal therefore fails, and their Lordships will humbly advise His Majesty to dismiss the same

(1) [1904] 1 Ch. 139.
(2) [1901] 2 Ch. 110.
(3) [1906] 1 Ch. 624.
(4) [1912] 2 Ch. 622, at p. 630.

with costs, but their Lordships consider that there should be one set of costs only as between the several respondents.

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Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents (other than Owens and Madeleine Kennedy): *Harrison & Powell.*

[PRIVY COUNCIL.]

LOUIS EDOUARD LANIER . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

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Oct. 16, 17; *Nov.* 5.

ON APPEAL FROM THE SUPREME COURT OF SEYCHELLES.

Criminal Law—Embezzlement—Seychelles Penal Code (Order 10 of 1904), s. 216—Nature of Offence—Criminal Intent—Conviction set aside.

The Seychelles Penal Code provides: "Embezzlement, s. 216 (1.): Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy, to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (prêt à usage) or for any work, with or without a promise of remuneration, with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs.3000)." The appellant was convicted of an offence under the above section:—

Held, (1.) that the offence defined by the above section is not limited to cases in which the accused is under a legal duty to return the specific goods, money, or document delivered to him; to constitute the offence, however, there must have been a wilful appropriation, squandering, or destruction of the property of another.

(2.) That the conviction of the appellant and the sentence upon him should be set aside upon the ground that the facts did not on any just or legal view warrant a conviction, and that justice had gravely and injuriously miscarried.

APPEAL by special leave from a conviction and sentence pronounced by the Supreme Court of Seychelles (July 5, 1911).

An information was preferred against the appellant charging

* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and SIR SAMUEL GRIFFITH.

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him, under the Seychelles Penal Code, s. 216, that he did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache, the owners thereof, the sum of 34,191 rupees, which sum had been delivered to him merely in pursuance of a deposit with the condition that the same should be returned or produced.

On July 5, 1911, the appellant was tried by the Acting Chief Justice without a jury; he was convicted and sentenced to eighteen months' imprisonment with hard labour.

The facts of the case and of the proceedings appear from the judgment of their Lordships. The appeal involved questions as to the scope and effect of the Seychelles Penal Code, s. 216. The following were the arguments upon these questions.

E. M. Pollock, K.C., and *R. W. Lee*, for the appellant. Though the offence charged against the appellant is termed embezzlement in s. 216 of the Code, it is not the offence so named in English law. It has its origin, through the Mauritius Penal Code, s. 333, in the French Penal Code, art. 408, where it falls under the head of "abus de confiance." The offence consists of the embezzlement (détournement in the French Code), squandering away, or destruction of a specific thing delivered to the accused under one of the contracts specified: Dalloz, Codes Annotés (ed. 1881), Code Pénal, p. 744, § 19. The offence is committed only upon a failure to restore or replace the specific thing delivered. In the present case the appellant received money as agent for the guardian of the minors and not under any of the conditions referred to in the section. He was not a trustee within the meaning of 24 & 25 Vict. c. 96, s. 1, and could not properly have been convicted under that Act: *Rex* v. *Kane*. (1) There was no proof of a fraudulent intention, which is a necessary element of the corresponding offence under the French Code: Dalloz, Codes Annotés, Code Pénal, p. 756, § 445.

Sir R. Finlay, K.C., and *O'Hagan*, for the respondent. The interpretation of the section is of importance in all colonies in which the criminal law is based upon the French system. The offence is not limited to cases in which the accused fails to

(1) [1901] 1 K. B. 472.

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return the specific thing delivered to him. This is indicated by the terms of the section, which covers the case of money entrusted to the accused. The French authorities shew that s. 408 of the French Penal Code is not so limited in its operation: Adolphe et Hélie, Théorie du Code Pénal (ed. 1862), vol. 5, pp. 418, 423, 441 to 445; Villargues, Les Codes Criminels (ed. 1877), p. 813, § 125, p. 814, § 153; Dalloz, Codes Annotés, Code Pénal, p. 748, § 169 et seq., § 177 et seq. If the section does not cover the offence of embezzlement or of larceny by a trustee or bailee, save in the limited manner contended for, those offences provided for by English law are, save to that extent, unprovided for in either the Seychelles or the Mauritius Penal Codes. [20 & 21 Vict. c. 54; 24 & 25 Vict. c. 96; Larceny Act, 1901 (1 Edw. 7, c. 10); and Archbold's Criminal Pleading (ed. 1910), p. 660 et seq., were referred to.] There was evidence upon which a fraudulent intent on the part of the appellant could be found.

E. M. Pollock, K.C., in reply.

1913
Nov. 5.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a conviction and sentence of the Supreme Court of Seychelles. It was pronounced on July 5, 1911, by the Acting Chief Justice, who tried the case without a jury.

The appellant is a merchant in Mahé on one of the Seychelles islands. He was at the time of the proceedings a member of the Legislative Council of the Colony and Consul for the French Republic, and he held various important commercial agencies. He was managing director of the firm of Lanier & Co.

It is for obvious reasons undesirable to comment upon various peculiarities of the case, and it is expedient to confine even the statement of the circumstances to the barest narrative. Such a narrative is, however, necessary.

There was in the colony a family of two minor children named Lablache. At a family council duly held under the law of the colony (derived from the French Civil Code) Miss Lucie Lablache was appointed to the office of their guardian. On November 14, 1908, she executed in favour of the appellant a procuration or power of attorney, and on April 2, 1909, on the eve of her leaving

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with the children for Europe, she confirmed the procuration by what is called a deed of maintenance. Under these deeds the appellant had the amplest powers to act for the guardian in the ingathering and the investment, either with or without security, of the property of the minors. Acting under these powers, certain funds were received and remittances of money were from time to time made by Messrs. Lanier & Co., the appellant's firm.

From beginning to end of these proceedings no suggestion has ever been made that either the minors personally, or Miss Lablache, their guardian, ever complained of, or are now or ever were dissatisfied with, the conduct of the appellant or his firm. Miss Lablache's anxiety appears to have been solely that a high rate of interest should be obtained, and this was done.

A circumstance of importance is that these payments were made by the firm of Lanier & Co. This firm's interposition (presumably at the instance of the appellant) appears to have been highly in the interest of the minors in past years. A regular account was opened, and from the year 1906 the minors' funds were received and advances made from time to time by the company. The advances were sometimes far in excess of the receipts ; and indeed in the end of 1908, whereas the receipts had been Rs.6119, the advances had been no less than Rs.9435.

In November, 1910, a sum of Rs.35,313 became payable to the minors by M. d'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the appellant and drawn upon the appellant's bankers, Messrs. Said & Co., but the transaction took the shape of crediting the amount to Messrs. Lanier & Co. in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier & Co. was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of this money which was lying with it at interest. The receipts for

the last three remittances are produced; they are dated in February, April, and May, 1911, and cover payments of 1500 francs. So far as M. d'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt, he was aware that the bankers had simply credited their customers Lanier & Co. with the amount. He was undoubtedly also aware of the history of the family, of the standing of the firm, and of its previous relations with the minors. That there was anything criminal being done does not at that time seem to have entered into any person's mind.

On June 20, 1911, however, a family council was held, which was presided over officially by Mr. Alexander Williamson, the Acting Chief Justice. A "Mr. Finlay Gemmel, friend" asked that Mr. Lanier "must shew what cash he has in hand belonging to the minors." Thereupon the appellant stated fully and with almost complete exactness how the matter stood. Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier. This was perfectly reasonable, and an adjournment was made till June 27, to enable one of these courses to be taken. Mr. Lanier acquiesced; and on June 27 a guarantee for Rs.34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minors' interests were completely protected. Sharply as the appellant had been pulled up, he had answered the call: the council were satisfied; and the guarantee and mortgage were put upon record. It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the appellant under the Seychelles Penal Code.

On the same day an information was filed charging Mr. Lanier with having wilfully, fraudulently, and feloniously embezzled the minors' money on the previous May 31. And on that day, namely, June 27, a warrant was issued for Mr. Lanier's arrest. On the next day, namely, June 28, the Chief Justice informed the family council that he had communicated with the Crown Prosecutor. The proceedings thus started were pursued

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with alacrity and vigour. The Prosecutor considered it desirable that a member of the Bar should conduct the case, and the family council, again presided over by the Chief Justice, appointed two, and arranged about their fees.

On November 1 the Prosecutor moved the Chief Justice to be allowed to make drastic amendments to the information, including one which altered the tempus delicti to June 20, 1911. These amendments were objected to; the objections were repelled; and the trial was fixed for four days afterwards, namely, July 5.

On July 5 an application was made for a week's adjournment to enable counsel to be employed for the defence, and a telegram from Tamatave, stating that counsel's passage was booked, was produced. The application was refused. The evidence led was substantially in accord with the narrative already given. The books were produced with all the entries in order. No further facts suggesting criminality were proved. In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime. The Chief Justice, however, convicted Mr. Lanier and sentenced him to be imprisoned for eighteen months with hard labour and to pay the costs of the prosecution.

Application for leave to appeal to the Supreme Court of Mauritius was refused, on the ground that the case was not appealable. This was correct. Had the sentence been for two years an appeal would have lain. A request was made that the sentence be increased, so as to made the case appealable. This was refused. An attempt was then made to bring the proceedings before the Supreme Court of Mauritius by certiorari, with a view to their being quashed. The learned judges of that colony not obscurely intimated that the affidavits before them disclosed a grave question, but they were constrained to decide that they had no jurisdiction to entertain such an application. Application for leave to appeal to His Majesty in Council was then made and was granted by this Board.

Many grounds for a reversal of the judgment appealed from have been made, and in the affidavits which form part of the present record others also of a grave character are suggested.

It appears to their Lordships, however, that the matter may be disposed of by a consideration of the facts above mentioned, of the judgment itself, and of the reasons stated therefor, the whole being viewed in the light of the statute. The information, as amended, upon which the trial proceeded, was as follows: "That on or about the 20th day of June in the year of our Lord one thousand nine hundred and eleven, at Seychelles, at a place called Victoria, one Louis Edouard Lanier, merchant, residing at Victoria, did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache the owners thereof, the sum of thirty-four thousand one hundred and ninety-one rupees and thirty-three cents, which sum had been delivered to the said Louis Edouard Lanier merely in pursuance of a deposit or trust whilst he was acting in his capacity as agent or proxy of the said minors' dative guardian, viz., Lucie Lablache, and as sub-guardian of the said minors, with the condition that the same be returned or produced against the form of the Statute in such case made and provided and against the peace of our Lord the King his Crown and Dignity."

The statutory ground of the information was not stated in its text. But on July 1, when the motion for amendment of its terms was made, the Crown Prosecutor announced that he proceeded upon s. 216 of the Seychelles Penal Code. That section is as follows:—

"Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy to the prejudice of the owner, possessor, or holder thereof any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (prêt à usage) or for any work with or without a promise of remuneration with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs.3000)."

In the construction of this section placed before the Board by the learned counsel for the appellant, an argument was presented that the section refers alone to the failure to restore

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or replace goods, money, &c., in forma specifica, and that the section was accordingly inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent. And the argument proceeded substantially to exclude all such ordinary cases as embezzlement from the ambit of the Seychelles Code, as it was also maintained that that crime was not dealt with by any other or more nearly applicable section. Against this argument Sir Robert Finlay, on behalf of the Crown, protested, and in their Lordships' opinion the protest was well founded. The statute does not appear to be limited in the sense contended for.

Upon the other hand, no countenance can be given to the view that the language of the statute can be used to rank within the category of crime conduct or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term "embezzle" is supplemented by the terms "squander away or destroy," the whole context and view of the section shew that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or, after possession of the same has been acquired, a wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which of course may be imposed by statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind. It is sufficient with regard to the judgment before the Board of the

Acting Chief Justice to remark that such distinctions, and, in particular, the distinction between criminal liability and civil liability to account, hardly seem to have been present to his mind. Two observations of his may be quoted which make this clear: "The act is wilful and fraudulent if he ought to foresee that a prejudice can result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result. He ought to have foreseen it. It was his duty not only to himself, but to those for whom he acted, to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice." In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any general principle of law or by any sound interpretation of the section. The second passage applies the erroneous doctrine thus:

"In this case the wilful and fraudulent intent resulted from the fact that the accused so used the moneys entrusted to him that he rendered himself unable to produce them when the demand was formally and legally made by the family council."

It is sufficient to say that, in the opinion of their Lordships, even though the legal doctrine proceeded upon were sound, the facts proved do not warrant, but negative, the conclusion drawn. The alleged date of the crime is June 20. That is the very date on which the position was explained by the appellant, and it was arranged that full security should be given, and it was given as stipulated. It would be straining the Act to apply it to anything done on that date, or indeed to the facts as a whole which were proved in this case.

Their Lordships are of opinion that the rules thus laid down by the judge are in no respect safe guides in a matter of criminal responsibility. If they were, all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These propositions are not made in order to mitigate the rigour of that civil responsibility which must

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attach to all the dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view.

This omission would in any case be serious, but in the present case the point is not merely formal, and the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere.

In criminal cases this Board does not lightly interfere. To use the language of Lord Watson in *In re Dillet* (1): "Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it be shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgment and sentence appealed from be quashed, and that the appellant be declared not guilty of the offence charged. Looking to the exceptional nature of the case the Crown will pay to the appellant the costs of the appeal. There will also be restored to him the amount of the costs of the prosecution paid under the judgment of the Court below.

Solicitors for appellant: *Loughborough, Gedge, Nisbet & Drew.*
Solicitors for respondent: *Sutton, Ommaney & Rendall.*

(1) (1887) 12 App. Cas. 459, at p. 467.

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SWAN BREWERY COMPANY, LIMITED . APPELLANTS ; J. C.*
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AND
THE KING . . . . . RESPONDENT. *Nov.* 18 ; *Dec.* 16.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Revenue—Duty on Dividend—Distribution of fully-paid Shares—Transfer from Reserve Fund to Capital Account—Liability for Duty—Dividend Duties Act, 1902 (*Western Australia*, 2 *Edw.* 7, *No.* 32), *ss.* 2 *and* 6—*Dividend Duties Amendment Act*, 1906 (*Western Australia*, 6 *Edw.* 7, *No.* 30), *s.* 2.

The Dividend Duties Act, 1902 (of Western Australia), provides by s. 6 that a company carrying on business in Western Australia and not elsewhere which declares any dividend shall pay a duty equal to one shilling for every twenty shillings of the amount or value of such dividend. Sect. 2 of the above Act, as amended by the Dividend Duties Amendment Act, 1906, s. 2, provides that "dividend" shall include "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors." The appellants, a company within the above statutes, passed resolutions that (1.) the capital of the company should be increased by 101,450*l.* divided into 81,160 new shares of 1*l.* 5*s.* each; (2.) that the sum of 101,450*l.*, being a portion of accumulated profits standing to the credit of the reserve fund, should be transferred to the credit of the share capital account; (3.) that the new shares should be allotted as fully paid up among the shareholders pro rata. The above resolutions were all carried into effect:—

Held, that these transactions were in effect a declaration of a dividend amounting to 101,450*l.* within the Dividend Duties Act, 1902, and that the appellant company was liable to pay duty upon that amount under that Act.

APPEAL from a judgment of the Supreme Court of Western Australia (October 11, 1912) upon a special case stated by consent of the parties pursuant to the Rules of the Supreme Court, 1909, Order XXXIII.

The appellant company was a company carrying on business

* *Present:* LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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in Western Australia and not elsewhere, and was a company within the meaning of the Dividend Duties Act, 1902, s. 2, as amended by the Dividend Duties Amendment Act, 1906, s. 2.

In the year 1911 the appellant company had a reserve fund, created out of accumulated profits, which was in credit to over 101,450*l.* These accumulated profits had been retained and used in the business of the company. On October 16, 1911, a resolution was passed, and confirmed by a special resolution on November 6, 1911, whereby the capital of the company was increased by 101,450*l.*, divided into 81,160 new shares of 1*l.* 5*s.* each. By a further resolution, passed and confirmed on the above dates, it was resolved that the sum of 101,450*l.*, part of the said accumulated profits of the company standing to the credit of the reserve fund, should be transferred to the credit of the share capital account to represent the capital value of the new shares. By a further resolution, passed and confirmed on the above dates, in consideration of the said sum of 101,450*l.* so transferred the directors were authorized to allot the new shares as fully paid up pro rata amongst the existing ordinary shareholders of the company. The above resolutions were carried into effect.

No duty was paid under the Dividend Duties Act, 1902, s. 6, upon any part of the said sum.

On June 5, 1912, an information was filed under the Crown Suits Act, 1908, at the suit of the Crown, claiming 5072*l.* 10*s.* as dividend duty at the rate of one shilling in the pound upon the profits so credited or distributed with interest at 7 per cent. per annum. The appellants delivered a defence denying that any of its profits had been credited or distributed among any of its members, and on September 9, 1912, a special case for the opinion of the Court, setting out the above facts, was stated by consent of the parties.

On October 7, 1912, the special case came on for hearing before the Full Court of the Supreme Court (Parker C.J. and McMillan J.). On October 11, 1912, judgment was delivered in favour of the Crown, the learned judges being of opinion that the above transactions were in effect the declaration of a dividend.

Sir R. Finlay, K.C., and *W. de B. Herbert*, for the appellants. The company neither declared nor distributed a dividend within the meaning of the Dividend Duties Act, 1902, and is not liable to pay any tax. The definition of "dividend" in that Act, as amended by the Act of 1906, includes only that which is in the nature of a distribution of income. The effect of the Dividend Duties Act, 1902, was considered in *Golden Horseshoe Estates* v. *Rex* (1), and it was there laid down that the question was what dividends have the directors declared, for it was only in respect of these that duty was payable. In the present case no dividend was declared. Nor did the company distribute any "profit, advantage, or gain" within the definition of "dividend." Each shareholder after the issue of the new shares was entitled to participate to the same extent in the profits and the capital as previously. The effect of the transaction was merely that the 101,450*l.* became issued capital instead of reserve capital. The Act imposes no duty upon an increased value of the shareholders' interest owing to an increased stability in the company. The decisions in cases as between a tenant for life and a remainderman, such as *Bouch* v. *Sproule* (2), *In re Northage* (3), and *In re Piercy* (4), are not applicable to the case, which depends entirely upon the construction of the statutes. [The Dividend Duties Act, 1902, ss. 6, 7, 8, 12, 13, 14, and the Dividend Duties Amendment Act, 1906, ss. 2, 3, 4, 5, were referred to.]

P. O. Lawrence, K.C., and *Whinney*, for the respondents, were not called upon.

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Dec. 16.

The judgment of their Lordships was delivered by

LORD SUMNER. This is an appeal from a judgment of the Full Court of the Supreme Court of Western Australia, by leave of that Court. The judgment was pronounced in favour of the Crown. A special case was stated by consent for the opinion of the Court, and it sets out the few facts that are relevant.

The appellant company carries on business in Western Australia and not elsewhere, and does so with success. It has not in the past distributed its profits up to the hilt. On the

(1) [1911] A. C. 480.
(2) (1887) 12 App. Cas. 385.
(3) (1891) 64 L. T. (N.S.) 625.
(4) [1907] 1 Ch. 289.

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contrary, it accumulated a reserve fund, which in 1911 amounted to more than 101,450*l.* In the latter part of that year it passed the necessary resolutions to increase its capital by 81,160 new shares of 25*s.* each. These new shares were duly allotted to the then shareholders as fully paid pro rata according to their holdings of old shares. No money passed, but 101,450*l.* was transferred from the reserve fund to the credit of the share capital account. Previously this money had been used in the company's business. After such transfer it continued to be used in the company's business, but it no longer represented part of the general reserve fund; it represented the capital value of the new shares. No dividend duty was paid by the company in respect of this sum.

It is evident that by this operation what had been floating capital to the amount of 101,450*l.* became fixed, and the company, which had not been bound to pay anything for the use of this money, now became bound, if it paid dividends at all, to pay dividends on 81,160 new shares as well as upon the old ones. To this extent at least there was more than a mere change in bookkeeping.

The Dividend Duties Act, 1902, of Western Australia taxes dividends. When a company such as the appellant company is, namely, one "carrying on business in Western Australia and not elsewhere," declares a dividend, it becomes bound within seven days to pay a duty of 5 per cent. on the amount or value of the dividend before distributing any dividend or profits. In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend. The question in issue here is whether or not the new shares were a dividend under the Act above mentioned. If they were, dividend duty was and is payable and the judgment appealed against was right. Sect. 2 of the Act defines, or rather describes, the word "dividend," as used in the Act, as including "every profit, advantage, or gain intended to be paid or credited to or distributed among the members of any company." The new shares were intended to be and were distributed among the shareholders; they were intended to be and doubtless are advantages to the allottees. The Supreme Court of Western

Australia held that they were dividends within the meaning of the Act, and that duty was payable on their amount or value accordingly. What is there wrong in this?

The argument is that there has been no dividend and no distribution, because nothing has been divided and nothing changed. Where formerly there was one share, enhanced in value by its right to participate in the reserve fund, if the company, being solvent, should be wound up voluntarily, now there are two, possessed of the same right of participation, but for that very reason worth no more and no less together than the one share was worth before. Formerly the company had a certain amount of capital; now it has the same without diminution or increase either temporary or permanent. The change is but one of name. Formerly its funds were so much share capital and so much reserve, all invested in the business; now they are so much more share capital and so much less reserve, all invested in the business still, and still unchanged in total amount. The duty claimed is not, it is said, a duty on or in proportion to any advantage either to the company or the shareholder measured by the increased stability of the company's own position or the increased facility to the shareholder in marketing his shares: it is measured by and is levied upon the whole nominal value of the new shares allotted, which is not the same thing as the value of the advantage distributed. Is this argument sound?

Their Lordships agree with the Supreme Court of Western Australia in thinking that it is not. There can be no doubt that the new shares were distributed and were not the same things as the old ones. They certainly were supposed to be advantages to the members of the company, none the less that the making of the issue was probably an advantage to the company also. In so flourishing a business doubtless they really were advantages. The new shares were credited as fully paid, and, what is more, they were fully paid, for after the allotment the company held 101,450*l.* as capital produced by the issue of those shares and for that consideration, and no longer as an undivided part of its accumulated reserve fund. True, that in a sense it was all one transaction, but that is an

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ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of 101,450*l.* in right of the old shares, and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of Parker C.J., "Had the company distributed the 101,450*l.* among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the 101,450*l.* would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is."

Their Lordships have therefore humbly advised His Majesty that the judgment of the Supreme Court of Western Australia was right, and that the appeal should be dismissed with costs.

Solicitors for appellants: *W. H. & A. G. Herbert.*
Solicitors for respondent: *Sutton, Ommaney & Rendall.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA AND OTHERS . } APPELLANTS ;

AND

THE COLONIAL SUGAR REFINING COMPANY, LIMITED AND OTHERS . . . . . } RESPONDENTS.

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Nov. 28 ;
Dec. 1, 2, 17

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Legislative Power of the Commonwealth Parliament—Constitution of the Commonwealth—Royal Commissions—Power to enforce Attendance of Witnesses—Penalties—Ultra vires—Federal Principle of Constitution—Royal Commissions Act, 1902 (*No.* 12 *of* 1902 *of the Commonwealth*)—*Royal Commissions Act*, 1912 (*No.* 4 *of* 1912 *of the Commonwealth*)—*Commonwealth of Australia Constitution Act*, 1900 (*Imperial*, 63 & 64 *Vict. c.* 12), *s.* 9 ; *Constitution, ss.* 51, 107, 128.

The legislative power of the Parliament of the Commonwealth of Australia as defined by s. 51 of the Constitution enacted by the Commonwealth of Australia Constitution Act, 1900, s. 9, is to "make laws for the peace, order, and good government of the Commonwealth with respect to" matters enumerated under thirty-nine heads. Sect. 107 of the Constitution provides that "any power of the Parliament of a Colony which has become or shall become a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or of the admission or establishment of the State, as the case may be." The Royal Commissions Act, 1902, and the Royal Commissions Act, 1912 (constituting together the Royal Commissions Act, 1902—1912), passed by the Parliament of the Commonwealth, purport to give to Royal Commissions issued under letters patent to make any inquiry, power to summon persons to give evidence and to produce documents and imposes penalties for a failure to obey the summons :—

Held, that the Royal Commissions Act, 1902, and the Royal Commissions Act, 1912, are ultra vires and invalid so far as they purport to enable a Royal Commission to compel answers generally to questions or to order the production of documents or otherwise to compel compliance by members of the public with its requisitions. The power to impose new duties on the subjects of, or on people residing in, any individual State was, before the Federation, vested in the Legislature

* *Present :* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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of that State, and the above Acts in the form in which they were passed by the Commonwealth Parliament cannot be brought within the powers which are, by clause 51 of the Constitution, exclusively vested in that Parliament.

The principle of the Constitution of the Commonwealth, embodied in the Act of 1900, is federal in the strict sense of that term, namely, in that the federating States, while agreeing to a delegation of a part of their powers to a common government, preserved in other respects their individual Constitutions unaltered.

APPEAL by special leave from an interlocutory order made by the High Court of Australia (October 4, 1912).

The appellants, who were defendants in the action, were the Attorney-General of the Commonwealth and the Commissioners under the Royal Commissions hereinafter referred to. The respondents (plaintiffs) were the Colonial Sugar Refining Company, Limited, that company's directors and general manager. The respondent company was registered in 1887 as a limited company under the Companies Acts then in force in New South Wales, and since that date had carried on in the various States of the Commonwealth and in New Zealand and in the Crown Colony of Fiji the business of manufacturing and buying raw sugar, and of refining and selling the same. The order appealed from was for an interlocutory injunction restraining the defendants, other than the Attorney-General, in the manner hereinafter stated.

The legislative authority of the Parliament of the Commonwealth is defined by s. 51 of the Constitution of the Commonwealth, enacted by the Commonwealth of Australia Constitution Act, 1900 (1); ss. 61 and 107 of the Constitution were also material to the appeal.

(1) The Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 9: "The Constitution of the Commonwealth shall be as follows:— . . . . 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:—(i.) Trade and commerce with other countries and among the States; (ii.) Taxation; but so as not to discriminate between States or parts of States; (iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth; . . . . (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth . . . . ; (xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of

The Royal Commissions Act, 1902 (No. 12 of 1902 of the Commonwealth), provided that whenever the Governor-General by letters patent under the great seal of the Commonwealth issued a commission to make any inquiry, the President or Chairman of the Commission, or the sole Commissioner, might by writing summon any person to attend and give evidence and to produce any books, documents, or writings in his custody. The Act provided for a penalty not exceeding 50*l.* being inflicted upon any person who should, without reasonable excuse, disregard the summons, or who should attend and refuse to be sworn.

On October 24, 1911, the Governor-General of the Commonwealth by letters patent under the great seal of the Commonwealth appointed the appellants, other than the Attorney-General and the appellant Brown, to be Commissioners "to inquire into and report upon the sugar industry in Australia and more particularly in relation to (*a*) growers of sugar cane and beet; (*b*) manufacture of raw and refined sugar; (*c*) workers employed in the sugar industry; (*d*) purchasers and consumers of sugar; and (*e*) costs, profits, wages and prices." On January 18, 1912, the secretary of the Commission wrote to the appellant company's solicitors, enclosing copies of a set of questions. The letter intimated that these questions were not designed in any way to limit the scope of the inquiry and

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the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australia; (xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth . . . . 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth . . . . 107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or the admission or establishment of the State, as the case may be."

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desired information as to whether an officer of the company, authorized to answer the questions and to give evidence, would attend before the Commission and be ready to produce the documents called for. A correspondence between the secretary and the appellant company's solicitors followed, and on April 24, 1912, summonses were served upon the individual respondents to attend and give evidence on May 1, 1912, and to produce certain documents specifically named. The list of questions enclosed in this letter were under fifty-nine different heads, many of which included several separate questions and formed a detailed inquiry into the history, trading, constitution, and operation of the company from the time that it originally commenced business. The character of some of the questions is illustrated by question 17A and question 56. The former asked for a detailed statement of what profit an original holder of ten shares in the company would have made if he had held his shares up to that time. The latter question asked for a statement of the number of servants and officers of the company whose salaries, including house rent and other allowances, exceeded 500*l.* per annum, the offices to which such salaries were attached, and the amounts of such salaries respectively, including bonuses, if any. The summonses to produce documents enumerated under fifty different heads all the documents which related to the whole history, operation, constitution, and internal working of the company, the profits of the company both within and without Australia, and of its individual shareholders, and the value of the different assets of the company both within and without Australia. The sitting of the Commission on May 1, 1912, having been adjourned, on May 4 fresh summonses were issued for May 6. On that day neither the directors nor the general manager attended. On May 7, 1912, information was laid by the secretary of the Commission against the individual respondents for failing to attend and for failing or refusing to produce the documents called for. The prosecutions were heard at the Water Police Court, Sydney, the case against the respondent McLaurin being first dealt with. After several adjournments the presiding magistrate imposed a fine of 25*l.* and ordered the said respondent to pay 320*l.* for costs.

Pending the above proceedings, on August 19, 1912, the Royal Commissions Act, 1912 (No. 4 of 1912 of the Commonwealth), came into operation. This Act amended the Royal Commissions Act, 1902, in several respects and provided that that Act as then amended might be cited as the Royal Commissions Act, 1902—1912. The material provisions of the last named Act are set out in the judgment; it empowered the Governor-General by letters patent to issue commissions "to make inquiry into and report upon any matter specified in the letters patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth." The Act of 1912 increased the penalties imposed by the Act of 1902 for failing to obey a summons to give evidence or to produce documents to 500*l.*, but provided certain exemptions.

On September 4, 1912, the Governor-General by letters patent issued a new commission appointing the appellants other than the Attorney-General and the appellant Brown "to inquire into and report upon the sugar industry in Australia." The particular subjects of inquiry named were substantially as in the previous commission, with the addition of "(*f*) the trade and commerce in sugar with other countries; (*g*) the operation of the existing laws of the Commonwealth affecting the sugar industry; and (*h*) any Commonwealth legislation relating to the sugar industry which the Commission might think expedient." These letters patent purported to be issued in the King's name by the Governor-General "acting with the advice of Our Federal Executive Council, and in pursuance of the Constitution of Our Commonwealth of Australia, the Royal Commissions Act, 1902—1912, and all other powers him thereunto enabling."

On September 6, 1912, a summons under the Royal Commissions Act, 1902—1912, was served upon the respondent the company's general manager requiring him to attend the Commission on September 16, 1912, to give evidence and to produce certain documents specified, being substantially those named in the previous summonses. On September 7, 1912, the appellant Brown was appointed chairman of the Commission in the place of the appellant Gordon, who had resigned.

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On September 10, 1912, the respondents instituted in the High Court of Australia an action against the appellants, other than the Attorney-General, who was subsequently added as a defendant. The plaintiffs by their writ claimed declarations that the Royal Commissions Act, 1902, and the Royal Commissions Act, 1902—1912, were beyond the powers of the Parliament of the Commonwealth and invalid, and that certain specified sections of those Acts were invalid; that the Royal Commissions were null and void; that they were not bound to attend or give evidence, or produce documents; or, alternatively, that they were not bound to answer any question or produce any documents which (1.) were in respect of a subject-matter as to which the Federal Parliament had no power to legislate; (2.) were not relevant to the terms of the commission. They also claimed an injunction to restrain the chairman and members of the Royal Commission from proceeding further on the summonses issued, or alternatively from asking questions or compelling the production of documents of the character described in (1.) and (2.) above; also, for an injunction restraining the issue of further summonses and from exercising such powers as should be held to be invalid.

The respondents served the appellants with a notice of motion for an interlocutory injunction in the terms claimed by the writ, and this motion came on for hearing before the High Court (Griffith C.J., Barton, Isaacs, and Higgins JJ.) on September 24, 1912. On October 4, 1912, the Court being equally divided, (Isaacs and Higgins JJ. dissenting from the order made,) by the casting vote of the Chief Justice it was ordered that the appellants, other than the Attorney-General, be restrained until the hearing of the action or further order from requiring the respondent the general manager "to answer any questions or to produce any documents which are relevant only to:—(1.) the internal management of the affairs of the plaintiff company; (2.) the operations of the plaintiffs outside the Commonwealth except so far as they related to the conditions of carrying on the sugar industry irrespective of the persons by whom it should be carried on; (3.) matters relating to the value of particular parts of the property of the plaintiff company except such parts as are actually and directly employed in

the production and manufacture of sugar within the Commonwealth; (4.) details of salaries paid to officers of the plaintiff company, except so far as they are relevant to the actual cost of such production and manufacture." It was also ordered that the further consideration of the motion should be adjourned to the hearing with leave to the plaintiffs to bring on the said motion by giving two days' notice to the appellants.

The learned judges were all of opinion that the provisions of the Royal Commissions Acts were intra vires the Parliament of the Commonwealth and were valid, but they disagreed as to the scope of the inquiries which can properly be made by Commissioners under a commission issued under those Acts and upon the question whether the case was one in which an interlocutory injunction should be granted. The Chief Justice and Barton J. were of opinion (1.) that the Commissioners could only require answers to questions and production of documents relevant to matters in regard to which the Parliament of the Commonwealth could legislate without an alteration of the Constitution; (2.) that certain of the proposed questions and of the documents required to be produced were relevant only to matters in which that Parliament had at present no power to legislate; (3.) that an interlocutory injunction should be granted, as they inferred from the facts that the Commissioners intended to enforce their requirements. Isaacs J. and Higgins J. were of opinion that as by the Constitution, s. 128, provision is made for the amendment and alteration of the Constitution, Commissioners might be authorized to exercise the compulsory powers in reference to any matter relevant to the subject of inquiry named in the letters patent; (2.) that the plaintiffs had failed to shew that the Royal Commission would exercise their compulsory powers in the event of the questions asked not being answered or the documents not being produced; (3.) that if they had power to grant an injunction they would decline to exercise their discretion to do so because of the embarrassment it might cause the Commissioners.

The judgments of the learned judges are reported at 15 C. L. R. 182.

On October 22, 1912, the High Court granted a certificate under

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s. 74 of the Commonwealth of Australia Constitution Act, 1900, and on December 12, 1912, special leave to appeal was granted by the Judicial Committee.

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the appellants. The opinion upheld by the casting vote in the High Court denies to the Commonwealth the right to obtain by the machinery of a Commission information relevant to the question of considering whether any or what legislation is or is not desirable for the purpose of altering the Constitution of the Commonwealth. Such a denial would have the effect of preventing the proper exercise of one of the most important powers of the Commonwealth. Laws in relation to industrial matters, such as the appointment of Commissions to inquire into industrial matters, are within the powers of the Commonwealth Parliament contained in s. 51, sub-heads (i.), (ii.), (iii.), and (xx.), of the Constitution. The Commonwealth Parliament has further the power given by s. 128 of the Constitution to alter, with the assent of the electors in each State, the Constitution, and the very wide powers given by s. 51, sub-head (xxxix.), with regard to "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." The powers given to Royal Commissions to compel the attendance of witnesses and the production of documents are "incidental" to the exercise of the powers directly given to the Commonwealth Parliament and to the powers extended under s. 128, and further under s. 51, sub-head (xxxviii.), to matters not within the legislative powers of the Parliament under the Constitution as existing. [*Clough* v. *Leahy* (1) and *Huddart, Parker & Co. Proprietary* v. *Moorehead* (2) were referred to.] In every case in which power is given to the Legislature its exercise to some extent impinges on the liberty of the subject, and it is in the discretion of the Legislature to determine in what cases its exercise is desirable. The question for the Judicature is merely whether the power is or is not vested in the Legislature: *Attorney-General*

(1) (1904) 2 C. L. R. 139. (2) (1908) 8 C. L. R. 330.

for Ontario v. *Attorney-General for Canada.* (1) If, as was rightly held by all the learned judges in the High Court, the Royal Commissions Acts are intra vires, no particular question can be held invalid, for it is impossible to predicate whether any question is or is not relevant to the inquiry. If those Acts, owing to their general language, are in part ultra vires, they should not be held to be invalid altogether, but must be construed according to the legislative power of the Commonwealth Parliament: *Macleod* v. *Attorney-General for New South Wales.* (2) [Reference was also made to 28 & 29 Vict. c. 63, s. 2.] The letters patent appointing the second Commission were issued by the Governor-General not only under the Royal Commissions Act, 1902—1912, but also under "all other powers him thereunto enabling." This included the prerogative power of the Crown vested by s. 61 of the Constitution in the Governor-General and the power to compel the attendance of witnesses, and the production of documents existed in the Commission apart from those Acts.

E. F. Mitchell, K.C., Adrian Knox, K.C., and *W. A. Barton,* for the respondents. Even assuming that the High Court rightly held that the Royal Commissions Acts were intra vires the Commonwealth Parliament, the Commissioners could only properly put and require answers to questions and could only properly require the production of documents which were relevant to matters within the existing area of the legislative power of the Parliament or incidental thereto. If "incidental" is to be construed in the wide sense contended for, the legislative powers of the Commonwealth, which are elaborately defined by s. 51 of the Constitution, would be practically unlimited. The letters patent do not shew that any change of the Constitution was in contemplation, nor had any steps been taken under s. 128, nor under s. 51, sub-head (xxxviii.). There was no power to inquire into how the growers of sugar had dealt with the profits they had made. But the Royal Commissions Acts are ultra vires and invalid in that their scope is not limited to matters within the legislative power of the Commonwealth as distinguished from that of the States, and the powers purporting to be given are too wide to be incidental to the

(1) [1912] A. C. 571. (2) [1891] A. C. 455.

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powers in fact possessed. The letters patent discussed in *Clough* v. *Leahy* (1) were issued by the Governor of New South Wales and not by the Governor-General of the Commonwealth. The decision of the majority of the High Court in *Huddart, Parker & Co.* v. *Moorehead* (2) is in the respondents' favour. If the effect of the Royal Commissions Acts is to be restricted as in *Macleod* v. *Attorney-General of New South Wales* (3) their scope will vary according to the view which different Courts may take as to the powers of the Legislature. As a matter of procedure the respondents are entitled to the injunction granted: *Dyson* v. *Attorney-General* (4); Rules of the High Court of Australia, Order IV.

Sir R. Finlay, K.C., in reply.

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Dec. 17.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. The question raised by this appeal is one of much importance. It turns on the true interpretation of the Constitution of the Commonwealth of Australia. It is only in exceptional cases that a question of this nature is submitted to the King in Council. Sect. 74 of the Constitution Act of 1900 provides that no appeal shall be permitted from a decision of the High Court of Australia upon any question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and any State or States, or as to the limits inter se of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by the Sovereign in Council. In the present case the High Court has taken the exceptional course of so certifying. The reason is that the four judges of that Court who heard the case were equally divided, and that under a statutory power relating to cases in which that Court is exercising original jurisdiction the decision was come to by the casting vote of the Chief Justice.

Their Lordships have given anxious consideration to the question brought before them under these circumstances, and they have heard arguments of much ability and fulness

(1) 2 C. L. R. 139.
(2) 8 C. L. R. 330.
(3) [1891] A. C. 455.
(4) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

from learned counsel of the Bars both of England and of Australia.

The circumstances of the litigation may be stated comparatively shortly. The Commonwealth Parliament passed Royal Commissions Acts in 1902 and 1912. These Acts are now consolidated into the Royal Commissions Act, 1902—1912, and this contains the following among other provisions :—(1.) (*a*) Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor-General, to make or authorize any inquiry, or to issue any commission to make any inquiry, it is hereby enacted that the Governor-General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons as he thinks fit, requiring or authorizing him or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth. (2.) Whenever the Governor-General by Letters Patent under the Great Seal of the Commonwealth issues a commission to any persons to make any inquiry, the President or Chairman of the Commission, or the sole Commissioner, as the case may be, may by writing under his hand summon any person to attend the Commission at a time and place named in the summons, and then and there to give evidence and to produce any books, documents, or writings in his custody or control which he is required by the summons to produce. By s. 3 the Commissioners are empowered to administer oaths to witnesses. By s. 5, if any person summoned to attend fails without reasonable excuse to attend or to produce documents, or books, or writings whcih he is required by the summons to produce, he is guilty of an offence and liable to a penalty of 500*l.*, but it is a defence if he proves that the documents are not relevant to the inquiry. By s. 6, if such person refuses to be sworn or make affirmation or to answer any relevant question, he is guilty of an offence and liable to the same penalty. By s. 6A any witness who has been summoned is to appear and report himself from day to day until released from further attendance. By s. 6B, if a person summoned as a

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witness fails to attend, the President or Chairman may issue a warrant for his apprehension, which the police may execute, with power to break and enter the defaulter's house. By s. 6D nothing in the Act is to make it compulsory for a witness to disclose a secret process, and by s. 6DD no answer made is to be admissible in evidence in any Court or criminal proceeding in any Commonwealth or State Court. Sect. 6E establishes wilful contempt of a Royal Commission as an offence punishable by fine or imprisonment, and gives the President or Chairman certain of the powers of a judge of the High Court in relation to contempt.

In 1911 the Government of the Commonwealth appointed a Royal Commission to inquire into the sugar industry in Australia, and in 1912 a new appointment of this Royal Commission was made. One reason for the new appointment was that the amendment of the old Royal Commissions Act to which reference has been made had been passed, and it was desired to make use of the powers which the amending Act conferred. The other reason was that the scope of the inquiry might be somewhat extended. The duty of the Royal Commission under the new appointment was to inquire into and report upon the sugar industry in Australia, and more particularly in reference to—(*a*) growers of sugar cane and beet; (*b*) manufacturers of raw and refined sugar; (*c*) workers employed in the sugar industry; (*d*) purchasers and consumers of sugar; (*e*) costs, profits, wages and prices; (*f*) the trade and commerce in sugar with other countries; (*g*) the operation of the existing laws of the Commonwealth affecting the sugar industry; and (*h*) any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient.

The appellants, other than the Attorney-General of the Commonwealth and the appellant Brown, were the originally appointed members of the Commission, the appellant Gordon having been the chairman. Shortly before the institution of these proceedings the latter resigned the position of chairman because of ill-health, and the appellant Brown was appointed in his place.

The respondent company is a sugar refining company

incorporated under the law of the State of New South Wales, and carrying on an extensive business in Australia and elsewhere. The other respondents are the directors and general manager of the company. Early in 1912 the secretary of the Royal Commission wrote to the respondents enclosing a list of questions which the Commission proposed to address to the respondent company, and intimating that these questions were not designed in any way to limit the scope of the inquiry. He requested to be informed whether an officer of the company would attend to answer the questions and give evidence and produce documents called for, and intimated that it might be necessary to issue a formal subpœna to the directors and officers or some of them. Correspondence took place between the secretary and the company's solicitors. The respondents objected to many of the questions put and declined to produce all of the documents called for. Summonses to compel attendance and to give evidence and produce documents were issued on behalf of the Commission, and these summonses having been heard in the police court at Sydney, fines were imposed. The respondents ultimately commenced this action in the High Court against the Commissioners, the Attorney-General of the Commonwealth being subsequently added as a defendant. They claimed a declaration that the Royal Commissions Acts were ultra vires of the Commonwealth Parliament, and that the respondents were consequently not bound to attend the meetings of the Commission or give evidence or produce documents; and, alternatively, that they were not bound to answer any questions or produce any documents which related to a subject-matter as to which the Commonwealth Parliament had no power to legislate or which were not relevant to the terms of the Commission. Consequential relief in the form of an injunction was also asked for. Notice of motion for an interlocutory injunction was then given. On October 4, 1912, the Court, consisting of the Chief Justice, Barton J., Isaacs J., and Higgins J., made an interim order the effect of which was that the respondents were not to be required to answer questions or produce documents relevant only to (1.) the internal management of the affairs of the company; (2.) the operations of the company outside the Commonwealth,

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except so far as they related to the conditions of carrying on the sugar industry, irrespective of the persons by whom it was carried on; (3.) matters relating to the value of particular parts of the property of the plaintiff company, except such parts as were actually and directly employed in the production of sugar within the Commonwealth; (4.) details of salaries paid to officers of the plaintiff company, except so far as they were relevant to the actual cost of such production and management.

It is from this order, which gave effect to the conclusion come to by the Chief Justice and Barton J., that the present appeal is brought. Their Lordships agree with these learned judges that if the respondents were entitled to succeed, it was, under the circumstances of the case and for reasons given in the judgment of the Chief Justice, right to grant an interim injunction. The real question in the case is whether the respondents were entitled to relief at all. It was held by the High Court that they were so entitled, not on the ground of the invalidity of the Royal Commissions Acts, for the four learned judges all took the view that these Acts were within the legislative powers of the Commonwealth Parliament, but because, in the opinion of the Chief Justice and Barton J., an attempt was being made to exercise, under cover of these Acts, powers which were not and could not be conferred by them. It was held that the powers actually and validly so conferred did not extend to inquiry into the internal or domestic management of the affairs of a company created under State laws, and that it was only as to its operations in matters within the area of the Federal power that regulations could be validly made by the Commission. The two learned judges whose opinion prevailed were of opinion that the power of the Commonwealth Government to hold an inquiry by commission exists only as incidental to powers presently vested in the Commonwealth by the Constitution, and that the mere fact that these powers might, by means of the machinery provided by the Constitution Act, be extended to other subjects such as some into which the Commission had proposed to inquire, did not authorize inquiry into such subjects. Isaacs J. and Higgins J., on the other hand, were of opinion that the Commonwealth Parliament possessed the right to legislate

for the purpose of obtaining information on existing matters which might form the subject of amendments to the Constitution. They based this conclusion on the construction of the Constitution Act itself. They were further of opinion that since, as the rest of the Court agreed with them in holding, the Royal Commissions Acts were not ultra vires, it was impossible to pronounce in advance that the questions sought to be put might not prove relevant to matters which were held by all the judges to be proper subjects of inquiry.

Their Lordships think that this last conclusion is entitled to weight. For even assuming that what can only be made relevant by an amendment of the Constitution is excluded from the class of subjects as to which the Commonwealth Government is entitled to insist on being furnished with information, it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws. If in order to render the powers given by the Royal Commissions Acts intra vires it is sufficient that they should be ancillary to possible subjects of present legislative capacity, as distinguished from being incidents in actual legislation about such subjects, it is not easy to say that the questions proposed in the present case to be put, and the documents sought to be obtained, are not relevant as throwing light on possible legislation. For s. 51 of the Constitution Act, which defines the legislative capacity of the Commonwealth Parliament, extends to subjects such as trade and commerce with other countries and among the States, taxation, bounties on production or export, statistics, and trading corporations formed within the limits of the Commonwealth. When their Lordships turn to the description of the information asked for as set out in the schedule to the summons which was served on the general manager of the company they find that the scope of this description is indeed very wide, extending as it apparently does to the entire field of the company's affairs, including its internal management. Its financial history and details of its transactions are called for, including the mode of its appropriation of profits. Particulars are, for example,

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to be given of its replacement and depreciation funds; of its "sundry creditors and suspense accounts"; of the cost price and present value of each of its refineries and mills; of the cost price and present value of its stocks and sugar; of the way in which its estimate of net profits has been arrived at; of the cost per ton of refining, taking by-products into account; of the quantity of sugar cane crushed and the extraction results, shewing the percentage of loss in manufacture, with the cost of manufacture in detail; of the names of the growers of the cane, and the analyses of the cane in each case; of the average prices received from wholesale buyers, with the rebates and discounts allowed, and of the resolutions of the directors relative to the prices which should be paid for cane and raw sugar, and at which refined sugar should be sold. These are examples taken from a series of questions which obviously must disclose many details of the mode in which the company carries on its business. To be compelled to answer them is a serious interference with liberty. But if there exists a right in the Government of the Commonwealth to put them, so far as relevant to a merely possible exercise of its actual legislative powers, the policy of doing so is something on which their Lordships are neither at liberty nor competent to express an opinion, and it seems to them impossible to say in advance which of these questions, if they can be insisted on at all, may not turn out in the course of a prolonged inquiry to be relevant or even necessary for the guidance of the Legislature in the possible exercise of its powers.

But there remains the question which goes to the root of the controversy between the parties. Were the Royal Commissions Acts intra vires of the Commonwealth Parliament? This is a question which can only be answered by examining the scheme of the Act of 1900, which established the Commonwealth Constitution. About the fundamental principle of that Constitution there can be no doubt. It is federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shews. The British North America Act of 1867 commences with the preamble that the then Provinces had expressed their desire to be federally united into

one Dominion with a Constitution similar in principle to that of the United Kingdom. In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions. Now, as regards Canada, the second of the resolutions, passed at Quebec in October, 1864, on which the British North America Act was founded, shews that what was in the minds of those who agreed on the resolutions was a general Government charged with matters of common interest, and new and merely local Governments for the Provinces. The Provinces were to have fresh and much restricted Constitutions, their Governments being entirely remodelled. This plan was carried out by the Imperial statute of 1867. By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order, and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by s. 92. There followed an enumeration of subjects which were to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it. The Act, therefore, departs widely from the true federal model adopted in the Constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to their people. Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.

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In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages.

Their Lordships will now examine the Commonwealth Constitution Act in the light of these observations with a view to answering the question whether the Royal Commissions Acts of the Australian Parliament were within the powers which by this instrument were transferred by the federating Colonies to the new central Parliament. It is plain that excepting in so far as such powers were so transferred they remained exclusively vested in the States. This results not merely from the broad principle laid down in s. 51, to which reference will presently be made, but from s. 107, which enacts that "every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or of the admission or establishment of the State, as the case may be." At the time of federation the federating Colonies possessed full powers, delegated to them by the Imperial Parliament, of legislating for the peace, order, and good government of their people. It is clear that the powers which the Royal Commissions Acts affect to exercise, of imposing, under penalties, new duties on the subjects of or people residing within the individual States, were before federation vested in the Legislatures

of these States. If so, the burden rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament to shew that this was done. In order to see whether this burden can be discharged, it is necessary to look closely at the wording of s. 51. The section commences by declaring that the Parliament of the Commonwealth shall, subject to the new Constitution, have power to make laws for the peace, order, and good government of the Commonwealth. But this power is not conferred in general terms. It is, unlike the corresponding power conferred by s. 91 of the Canadian Constitution Act of 1867, restricted by the words which immediately follow it. These words are "with respect to," and then follows a list of enumerated specific subjects. Their Lordships have already referred to the material heads in this list. None of them relate to that general control over the liberty of the subject which must be shewn to be transferred if it is to be regarded as vested in the Commonwealth. It is of course true that under the section the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquiries which the Royal Commissioners are now making. And the field of the Royal Commissions Acts —which are to apply to any Royal Commission, whether issued under statutory authority or under the common law powers of the Crown—goes far beyond any of the first thirty-six of the classes of subjects enumerated in the section. It was held by Isaacs J. and Higgins J. that the inquiries directed by the Commission might well be relevant to the question of the desirability of a change of the Constitution which might take place either under the express provisions of s. 128 by special legislation passed under certain conditions and approved after a referendum

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in the States, or possibly under sub-head (xxxviii.) of s. 51, which enables the exercise by the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which could at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom or the Federal Council of Australia. But their Lordships think that the answer to this argument given in the judgments of the Chief Justice and of Barton J. is conclusive. No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, has been actually exercised, and until it has been it cannot be prayed in aid. No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed it intended to give Australia the largest capacity of dealing with her own affairs, and the Imperial statute enables her to act without coming to the mother Parliament. But the people of Australia have elected to put into the Act restrictions on change of another kind. Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the statute what rights of legislation the federating Colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion.

Nor, in their Lordships' opinion, is the question carried further by sub-head (xxxix.) which declares to be within the legislative capacity of the central Parliament matters incidental to the execution of any power vested by this Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law. The authority over the individual sought to be established by the Royal Commissions Acts,

the new offences which they create, and the drastic powers which they confer, cannot, in their Lordships' opinion, be said to be incidental to any power at present existing by statute or at common law. A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts, in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth Legislature. Their Lordships hesitate to differ from judges with the special knowledge of the Australian Constitution which the learned judges of the High Court and not least the Chief Justice and Barton J. possess, but the question they have to decide depends simply on the interpretation of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the Sugar Industry contemplates in order to make its inquiry effective. They think that these Acts were ultra vires and void so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition.

It will be sufficient to make a declaration to this effect with liberty to apply to the High Court to enforce it by injunction or otherwise. Their Lordships will therefore humbly advise His Majesty that such a declaration should be made, and that such

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liberty to apply should be granted, and that the order of the High Court should be varied accordingly. As the respondents have substantially succeeded the appellants must pay the costs of this appeal. The costs of the application of June 10, 1913, will be costs in the appeal.

Solicitor for appellants: *J. H. Galbraith.*
Solicitors for respondents: *Light & Fulton.*

[PRIVY COUNCIL.]

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DAVID MACLAREN AND ANOTHER . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Riparian Owners—"Navigable and floatable rivers"—Construction of Grants—Boundaries of Townships—River floatable for Loose Logs only—Civil Code of Lower Canada, art. 400.

The appellants were the owners of lands on either side of the river Gatineau in the Province of Quebec. The lands were held under grants by letters patent in which they were described as numbered lots in the townships of Low and Denholm. These townships, which were on opposite sides of the river, had been created by letters patent and a proclamation, which, in each case, described the townships as being bounded by the river, but in addition gave detailed boundaries which were stated to start from a post and stone boundary upon the bank of the river, to describe a certain course inland therefrom, then to return to another post and stone boundary at a higher point on the river bank, and "thence along the bank of the river following its sinuosities as it winds and turns to the place of beginning." It was found that the river Gatineau (which was a non-tidal river) was one down which loose logs only could be floated, and not logs in the form of cribs or rafts.

The Civil Code of Lower Canada, art. 400, provides: "Roads and public ways maintainable by the State, navigable and floatable rivers and streams and their banks . . . . and generally all those portions of territory which do not constitute private property are considered as being dependencies of the Crown domain":—

Held, (1.) that the general descriptions of the townships as being

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* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

bounded by the river were not varied by the references to the posts and stone boundaries in the detailed descriptions; (2.) that the river Gatineau, being one down which only loose logs could be floated, was not a part of the Crown domain within art. 400; (3.) that the appellants' lands on either side of the river extended ad medium filum aquæ.

Tanguay v. *Canadian Electric Light Co.* (1908) 40 Can. S. C. R. 1 approved.

APPEAL, by special leave, from a judgment of the Supreme Court (March 15, 1912) affirming (by reason of an equal division of opinion) a judgment of the Court of King's Bench (Appeal side) of Quebec (June 27, 1911), which reversed a judgment of the Superior Court (May 30, 1910).

The appellants, as plaintiffs in the action, claimed as against the defendants, E. and W. Hanson, a declaration that they were owners and proprietors of certain portions of the bed of the river Gatineau, and that a grant made to the defendants by the Commissioner of Lands, Forests, and Fisheries of the Province of Quebec was null and void, and for an injunction. The respondent, the Attorney-General, intervened in the action before the trial, and the litigation subsequently proceeded between the appellants and the respondent.

The facts, which are fully set out in the judgment of their Lordships, may be stated shortly as follows. The appellants were the owners of certain lands on both sides of the river Gatineau in the Province of Quebec, the lands lying opposite to one another with the river intervening. The appellants as to the lands on the western side of the river were the successors in title to the grantor under letters patent, dated as to part November 26, 1860, and as to the remainder April 8, 1865. The appellants' lands upon the eastern side of the river formed part of the township of Denholm, and as to these they were the successors in title to the grantor under letters patent dated March 24, 1891. The townships of Low and Denholm had been created respectively by letters patent in 1859 and by proclamation in 1869. The descriptions of the boundaries therein, which included a reference to a post and stone boundary on the bank of the river, are fully set out in the judgment. On December 7, 1899, the Commissioner of Lands, Forests, and Fisheries of the Province of Quebec, on behalf of the Government of the

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Province, sold and granted to the defendants the water lot and water power comprising the bed of that part of the river which flowed between the lands of the appellants. It was found as a fact by the trial judge that the river Gatineau (which was non-tidal) was floatable only for loose logs (flottable à bûches perdues), and that it was not floatable for cribs or rafts (flottable en trains ou radeaux). Their Lordships agreed with this finding of fact and by their judgment described the river Gatineau as follows: "The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water which goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness." It appeared from the evidence that extensive lumbering operations were carried on upon the river Gatineau, and that one million pieces of logs and timber were floated down the river yearly, all in single sticks, and were collected at the mouth of the river on behalf of the various firms conducting the operations.

Two questions arose for determination upon the appeal, namely: (1.) Whether the descriptions of the appellants' lands in their documents of title were such as would under English law carry the bed of the river.

(2.) Whether the river Gatineau came within the Civil Code of Lower Canada, art. 400, which provides that "navigable and floatable rivers and streams and their banks . . . . are considered as being dependencies of the Crown domain," and, if so, whether the presumption as to the ownership of the bed by the riparian owners was excluded.

The trial took place before Champagne J., who, on May 30, 1910, delivered judgment in favour of the plaintiffs and granted an injunction. The present respondent appealed to the Court of King's Bench (Appeal side), which, by its judgment delivered on June 27, 1911, allowed the appeal. Jetté C.J. and Trenholme, Lavergne, and Cross JJ. held that the river Gatineau was navigable and floatable and a dependency of the Crown domain within art. 400, and that the present appellants had no right to any

part of the bed of the river or water power; they further held that the banks and bed of the river did not form part of the townships of Low or Denholm, and were consequently not included in the grants to the plaintiffs' predecessors in title. Carroll J. felt bound by the decision in *Tanguay* v. *Canadian Electric Light Co.* (1) to hold that the river, being floatable only for loose logs, was not navigable or floatable within art. 400, but he agreed with the other members of the Court upon the second ground.

The appellants appealed to the Supreme Court, which delivered judgment on March 15, 1912. The Court was equally divided in opinion, Fitzpatrick C.J. and Anglin and Brodeur JJ. being in favour of allowing the appeal, while Davies, Idington, and Duff JJ. were in favour of dismissing it on the ground that, though the river might be neither navigable nor floatable, still the appellants did not acquire any part of the bed under their titles by reason of the language used in the letters patent and in the proclamation creating the townships of Low and Denholm.

Sir R. Finlay, K.C., *Aylen, K.C.*, and *Geoffrey Lawrence*, for the appellants. The appellants' lands, upon the proper interpretation of the grants to their predecessors in title, were bounded by the river and, according to the well established rule of construction in English law, they extended ad medium filum aquæ: *Berridge* v. *Ward* (2); *Reg.* v. *Strand Board of Works* (3); *Caldwell* v. *McLaren* (4); *Micklethwait* v. *Newlay Bridge Co.* (5); *City of London Tax Commissioners* v. *Central London Railway.* (6) The rule of construction applies to grants by the Crown and to municipal boundaries as well as to conveyances between subjects, and it has frequently been applied to Canadian lands: *Lord* v. *Commissioners of Sydney* (7); *In re McDonough* (8); *Reg.* v. *Robertson* (9); *Massawippi Valley Ry. Co.* v. *Reed* (10); *Keewatin Power Co.* v. *Township of Kenora* (11); *Wyatt* v. *Attorney-General*

(1) 40 Can. S. C. R. 1.
(2) (1861) 10 C. B. (N.S.) 400.
(3) (1863) 4 B. & S. 520.
(4) (1884) 9 App. Cas. 392, at p. 404.
(5) (1886) 33 Ch. D. 133.
(6) [1913] A. C. 364.
(7) (1859) 12 Moo. P. C. 473, at pp. 496-498.
(8) (1870) 30 Upper Can. Q. B. 288.
(9) (1882) 6 Can. S. C. R. 52, at p. 92.
(10) (1903) 33 Can. S. C. R. 457.
(11) (1908) 16 Ont. L. R. 184.

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of Quebec. (1) The lands upon the right bank were expressly stated in the letters patent by which they were granted to be bounded by the river, and this boundary cannot be limited by reference to the boundaries of the township of Low: *Attorney-General of Quebec* v. *Scott.* (2) This, however, is not material, for upon the true construction of the letters patent and the proclamation creating the townships referred to in the grants they extended ad medium filum aquæ. The reference in the detailed boundaries to posts upon the bank does not alter the general description that the townships are to be bounded by the river: *William* v. *Packard.* (3) In the United States the law is well established that under descriptions similar to those of the townships, namely, by reference to monuments or posts upon the river's bank, the grantee takes to the middle of the river. Angell on Watercourses, 7th ed. (1878), §§ 24 and 29, and cases there cited; also Kent's Commentaries, vol. iii., p. 428.

The evidence establishes that the river Gatineau is suitable for floating loose logs only (flottable à bûches perdues) and not for cribs or rafts (flottable en trains ou radeaux). It is consequently neither navigable nor floatable within the meaning of art. 400 of the Civil Code and is not part of the Crown domain under that section. The French version of the section is practically identical with art. 538 of the Code Napoléon; both use the phrase "navigables et flottables." The commentators upon the French Code agree in distinguishing rivers flottables en train ou radeaux from those which are flottables à bûches perdues, and treat the latter as not being part of the public domain. At the time the law of Quebec was codified the word "flottable" had acquired a well-defined meaning, in accordance with the French law, and the presumption is that the codifiers used the word in that sense: Dalloz, Jurisprudence Générale, Répertoire, tit. Eaux, c. 2 s. 2 § 58 et. seq., c. 4 § 208; tit. Voirie par Eaux, c. 2 s. 1 § 44; Daviel, Cours d' Eau, 3rd ed. (1845), vol. i. §§ 35—37, vol. ii. p. xxiii.; Sirey et Gilbert, Les Codes Annotés, art. 538, note 16; Legrande, Dict. Usuel de Droit, tit. Eaux. The Supreme Court in *Tanguay* v. *Canadian Electric Co.* (4), after an elaborate con-

(1) [1911] A. C. 489.
(2) (1904) 34 Can. S. C. R. 603.
(3) (1908) 17 Ont. L. R. 547.
(4) 40 Can. S. C. R. 1.

sideration of the authorities, decided by a majority of four to two that rivers which were floatable only for loose logs were not within art. 400. That decision was in accordance with the Canadian authorities. [Reference was made to *Oliva* v. *Boissonnault* (1); *Boswell* v. *Denis* (2); *Turcotte* v. *Laferrière Lumber Co.* (3); *Ward* v. *Township of Grenville* (4); and to Seign. Quest. A, qq. 27, 28, pp. 68a—70a; B, Opinion of Badgely J. 61i to 64i.]

Under the R. S. of Quebec, 1909, arts. 7298 and 7349 (2.), and under R. S. Can., 1906, c. 55, s. 184, the public have the right to float logs down all rivers and lakes in the Province of Quebec, whether floatable or navigable or not. The title to a portion of the river bed claimed by the appellants therefore does not interfere with the rights of the public in connection with lumbering: *McBean* v. *Carlisle* (5); *Reg.* v. *Robertson* (6); *Caldwell* v. *McLaren.* (7)

The grants to the defendants Hanson of the water lot and water power interfered with the appellants' rights as riparian owners under the Civil Code of Lower Canada, art. 503, and under 19 & 20 Vict. c. 104 (Canada), the latter enactment being now contained in R. S. Quebec, 1909, art. 7295.

R. C. Smith, K.C., *Buckmaster, K.C.*, and *Hamar Greenwood*, for the respondent. The evidence establishes that the river Gatineau is the artery of a very important lumbering industry and navigable in a commercial sense. The true test as to whether a river is within art. 400 is whether it is navigable for profitable and commercial purposes: *Bell* v. *Corporation of Quebec.* (8) The fact that obstructions to navigation exist at certain points does not prevent a river from being navigable: *Thompson* v. *Hurdman.* (9) So, too, the fact that a river is not floatable at all seasons of the year does not prevent it from being a floatable river within the meaning of the article, for if it did the same reasoning would apply to navigable rivers, and the

(1) (1832) Stuart's Lower Can. Rep. 524 and 564.
(2) (1859) 10 Lower Can. Rep. 294.
(3) (1905) Beaubien, 290.
(4) (1902) 32 Can. S. C. R. 510.
(5) (1874) 19 Lower Canada Jurist, 276.
(6) 6 Can. S. C. R. 52, at pp. 114, 129.
(7) 9 App. Cas. 392.
(8) (1879) 5 App. Cas. 84, at p. 93.
(9) (1895) Quebec L. R. 4 Q. B. 409.

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St. Lawrence, which is ice-bound for five months, would not be a navigable river. In so far as the law of Quebec rests upon French law it is the French jurisprudence of and anterior to 1774. The distinction between rivers flottables à bûches perdues and those flottables en train ou radeaux was not established in France until a later date and depends upon French Orders in Council made in 1822 and later. It is fallacious to give to the word flottable as used in Canada the same meaning as in France, where the physical character and commercial utility of the rivers are widely different. [Reference was made to Spier's Dict. Franc., s.n. "flottable"; Sirey, Code Napoléon (1892) art. 538, n. 45.]

[VISCOUNT HALDANE L.C. referred to the judgment of Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1) as to the principles upon which codified law should be interpreted.]

The case of *Tanguay* v. *Canadian Electric Co.* (2) was wrongly decided by the majority in the Supreme Court. The decision was founded upon wrong hypotheses, (1.) as to the effect of French jurisprudence; (2.) that the Seigniorial Court had given a decision upon the question. The distinction sought to be drawn between rivers flottables en train ou radeaux and those flottables à bûches perdues was not referred to by the Seigniorial Court: Seign. Quest. A, qq. 26, 27, 31, 32. The Canadian authorities down to that decision were strongly in the respondent's favour. [In addition to the Canadian cases referred to on behalf of the appellants, reference was made to *Peirce* v. *McConville.* (3)] The effect of the descriptions of the townships in the letters patent and the proclamation is that nothing outside the stone pillars upon the banks of the river is included in the grants. The decisions, relative to the laying out of building estates, in which it has been held that the presumption does not apply, are more nearly applicable in the circumstances than the decisions relied on by the appellants: *Leigh* v. *Jack* (4); *Mappin Brothers* v. *Liberty & Co.* (5) The authorities shew that little is required to exclude the presumption from arising.

(1) [1891] A. C. 107, at p. 145.
(2) 40 Can. S. C. R. 1.
(3) (1898) 5 Revue de Jurisprudence, 534.
(4) (1879) 5 Ex. D. 264.
(5) [1903] 1 Ch. 118.

Sir R. Finlay, K.C., in reply, referred, in addition to cases already mentioned, to *Laurin* v. *Charlemagne Lumber Co.* (1)

The judgment of their Lordships was delivered by

LORD MOULTON. The appellants in the present appeal are David and Alexander Maclaren, the plaintiffs in the original litigation, and the respondent is the Attorney-General for the Province of Quebec, who intervened in the suit under circumstances hereinafter mentioned, and who, since such intervention, has substantially carried on the litigation on behalf of the Government of the Province. To make clear the points in dispute it will be necessary to set out somewhat in detail the facts of the case and the history of the litigation.

The river Gatineau is a river of considerable size but irregular bed flowing into the river Ottawa on its north bank. Starting from the river Ottawa and proceeding up the river Gatineau one passes through the township of Hull, and then through the township of Wakefield. North of the township of Wakefield the river Gatineau has on its left or eastern bank the township of Denholm and on its right or western bank the township of Low. The documents creating these townships are letters patent issued by the Crown, in whom, of course, the property in the soil was originally vested, and such documents specify and define the boundaries of these townships.

By letters patent dated November 26, 1860, a portion of the township of Low, known as lot 39 of range 2 of that township, was granted to Caleb Brooks, and subsequently by letters patent dated April 8, 1865, another portion, known as lot 38 of range 2 of that township, was also granted to him. Both these lots lie along the right bank of the river. By divers mesne assignments, the validity of which is not questioned, the plaintiffs have become the owners of seventeen acres of lot 39, and about four acres of lot 38, these portions being so situated that they may, for the purposes of this case, be taken to include so much of the lands comprised in lots 38 and 39 as lies along the river.

By letters patent dated March 24, 1891, the west half of a portion of the township of Denholm, known as lot 38 of range 1

(1) (1900) 6 Revue de Jurisprudence, 49.

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of that township, was granted to William Brooks. The land so granted (which lies along the left bank of the river Gatineau) was, by a deed of sale dated May 4, 1894, sold by the said William Brooks to the plaintiffs. The validity of these transactions is not questioned.

It is not disputed, therefore, that the plaintiffs are the owners of lands on both sides of the river Gatineau, lying opposite to each other and so situated that, if the plots comprised in the grants are riparian lands, and if the ordinary presumptions of English law hold good, they would carry with them the ownership of the bed of the river lying between them. Whether these lands are riparian and whether these presumptions do hold good in the case of the river Gatineau are the two questions to be decided in the present case.

But these questions are raised in a very peculiar way, which necessitates the statement of certain further facts.

On December 7, 1899, S. N. Parent, Commissioner of Lands, Forests, and Fisheries of the Province of Quebec, on behalf of the Government of that Province, sold to Edwin and William Hanson, the defendants in the Court below, "the water lot and water power, situate on the river Gatineau, comprising all that portion of the bed of that river, covered by the 'Paugan Falls and Rapids,' and the island and rock situate at the front thereof, and lying in front of lots 38, 39 and 40 of the second range of the township of Low, and of lots 38, 39 and 40 of the township of Denholm." It is not disputed that this grant covers portions of the bed of the river Gatineau which would belong to the appellants if the two questions above mentioned are answered in their favour.

The litigation was commenced by the plaintiffs, who set up a title to these portions of the bed of the river based on the conveyance to them of the adjoining lands, and alleged that the defendants, Edwin and William Hanson (the above-mentioned purchasers from the Crown), had illegally, improperly, and without right entered on the property of the plaintiffs and had falsely claimed to be the owners thereof, and had offered the same for sale as such owners, and threatened and intended to re-enter and erect works thereon, and they prayed that the plaintiffs should

be declared the owners of the property in question, and that the alleged sale by the Commissioner of Lands, Forests, and Fisheries to the defendants should be declared to be null and void and without effect in so far as it assumed to sell or to grant to the defendants any part of such property. They further claimed an injunction and damages. The defendants in their defence denied that any portion of the bed of the river belonged to the plaintiffs or had been included in the grants made to the plaintiffs' predecessors in title. Among other allegations of fact they set up that the river Gatineau is a navigable and floatable river whose bed formed part of the Crown domain, and that accordingly no part of such bed was included in the grants in question. This issue, as will presently be seen, has eventually become the main issue in the case.

Shortly before the plaintiffs put in their answer to the defendants' plea (which consisted substantially of a joinder of issue), the Attorney-General of the Province of Quebec intervened, as being interested in the event of the suit and entitled to be heard therein. As the grantor to the defendants, the Government of the Province was interested in defending the validity of its grant. Since this intervention the litigation has in substance been confined to the questions raised by the intervener, and it has been carried on between the plaintiffs on the one side and the Government, represented by the Attorney-General of Quebec, on the other. It is, therefore, not necessary to refer to the cross-demand of the defendants, or the claim for damages on the part of the plaintiffs, as the only point now before the Board is the question of title to the bed of the river.

The history of the litigation shews great differences of judicial opinion on the issues involved therein. Champagne J., the judge at the trial, decided in favour of the plaintiffs on all points. On appeal to the Court of King's Bench (Appeal side) that Court (consisting of five judges) decided against the plaintiffs on all points. Appeal was then brought to the Supreme Court of Canada, and the six judges who heard the appeal were equally divided on the question of the plaintiffs' title, although on other points they agreed with the judgment of Champagne J. The appeal was accordingly dismissed, and

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it is from this decision of the Supreme Court of Canada that the present appeal is brought.

The case divides itself into two heads. In the first place, the respondent denies that the descriptions in the grants, through or under which the plaintiffs hold, are such as would carry the bed of the river, even under English law. In the second place, he says that even if such were the case, it is not in accordance with the law of the Province to apply the English presumptions as to the ownership of the bed of a river or its inclusion in grants of the lands forming its banks to the case of a river such as the river Gatineau. In other words, he alleges that the river Gatineau is a navigable and floatable river, and that, by the law of Quebec, no portion of the bed of such a river goes with a grant of the land on its banks.

Excepting upon one point, there has been no dispute as to the facts of the case. At the trial the defendants sought to shew that the river Gatineau is navigable and floatable both to ships and rafts. The plaintiffs admitted that loose logs can be floated down it at certain times of the year, but they contended that it is not floatable otherwise than à bûches perdues. After hearing evidence on both sides, the learned judge at the trial found that (so far as is material to this case) the plaintiffs' contention was correct. His decision was reversed by the judges of the Court of King's Bench, who decided (Carroll J. dissenting) that the river was both navigable and floatable, but it is difficult to determine how far this reversal was due to their view of the law and how far to their view of the facts. On the appeal to the Supreme Court four out of six judges agreed with the conclusion of the judge at the trial on the facts, and the other two expressed no opinion thereon. Their Lordships agree with the view taken by the judge at the trial, by Carroll J. in the Court of King's Bench, and by the majority of the judges of the Supreme Court, and hold that on the evidence the river Gatineau must be taken to be "flottable à bûches perdues" only, and to be neither "navigable" nor "flottable en trains ou radeaux." Indeed the correctness of this view of the facts was hardly contested at the hearing of the appeal.

In order to decide the first point it is necessary to examine the

documents of title under which the plaintiffs hold their lands. Taking first the history of the title of that portion of the plaintiffs' lands which lies on the right bank of the river, we commence with letters patent dated December 1, 1859, creating the township of Low. These letters patent, after reciting that it is expedient to erect into a township a certain tract of waste land lying in the county of Ottawa, proceed to describe that tract as follows: "All that certain tract or parcel of land bounded and limited as follows, that is to say: On the north by the township of Aylwin; on the south partly by the township of Masham and partly by the township of Wakefield; on the east by the river Gatineau, and on the west partly by the township of Cawood and partly by the township of Aldfield; beginning at a post and stone boundary erected on the western bank of the river Gatineau aforesaid at the intersection of the north line of the township of Wakefield aforesaid and marking the south-east angle of the said tract or parcel of land; thence along the said north line of the township of Wakefield . . . . thence along the said south outline of the township of Aylwin astronomically east nine hundred and thirteen chains ninety-one links more or less to the intersection of the west bank of the river Gatineau aforesaid at a post and stone boundary, marking the south-east angle of the said township of Aylwin, and the north-east angle of the said tract or parcel of land; thence southerly along the said west bank of the river Gatineau and following its sinuosities as it winds and turns to the place of beginning. The said tract or parcel of land thus circumscribed . . . . has been further laid out and subdivided . . . . into ranges and lots in the manner following . . . . range first into 34 lots numbered from north to south, namely, from No. 1 to 34 inclusive, the same being broken lots and bounded towards the east individually and collectively by the river Gatineau aforesaid; range second into 56 lots numbered from north to south, namely, from No. 1 to 56 inclusive . . . . the whole as represented on the plan of the said tract or parcel of land hereunto annexed as near as the nature and circumstances of the case will permit, and in conformity to the actual survey in the field as returned and of record in the Crown Lands Department."

The actual plan referred to in these letters patent does not

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appear to have been put in at the trial by either party, but the plan which is now of record in the public department and which came into force on January 20, 1902, was put in by the appellants at the trial, and no objection was taken to it (otherwise than that the document actually put in was a copy and not the original), and it has been freely referred to without objection at the hearing of this appeal, so that their Lordships conclude that it must have been taken by the parties as representing or reproducing the plan referred to in the letters patent. It accords exactly with the above description, and shews the township as bounded on the east by the river Gatineau.

Whether the map or the verbal description of the parcels be taken as defining the land, their Lordships have no doubt that it was meant to be riparian. The dominant words in the description are that the land is bounded "on the east by the river Gatineau," and this is precisely what is represented on the map. It would require words in some other part of the letters patent plainly inconsistent with this to justify a construction being put on these letters patent which would make the land which they cover a parcel which is not bounded "on the east by the river Gatineau." So far from any such words being present, the only other description of the boundary agrees with and emphasizes this language. It starts from the post on the bank which marks the point where the township commences to be bounded by the river Gatineau and proceeds as follows: "thence southerly along the said west bank of the river Gatineau, and following its sinuosities as it winds and turns." This is just such a description as one would give of the metes and bounds of a riparian property which was bounded by the river, and, in their Lordships' opinion, the use of this form of words in the detailed description of the boundaries of the township does not qualify in any way the simpler description that it is bounded "on the east by the river Gatineau."

The township of Low is, therefore, riparian, and from the position of the plaintiffs' land in the township, it follows that it also is riparian. But the fact that the portion of the plaintiffs' property which is situated in this township is riparian is made still more clear when we examine the grants under which it passed to their

predecessors in title whether we take those grants by themselves or in conjunction with the above letters patent creating the township of Low. The letters patent granting lot No. 38 to the predecessor in title of the plaintiffs describe the parcel thus: "The lot number thirty-eight in the second range of the township of Low aforesaid; being a broken lot bounded in front to the east by the river Gatineau and to the west by the third range of the said township." And the letters patent granting lot 39 adopt exactly the same phraseology. The Crown had undoubtedly the power to make a grant of riparian land thus situated, and these two grants clearly grant it. This would suffice to decide the point, but it is to be noticed that each plot is spoken of as forming part of the township of Low, which shews that those acting for the Crown in making these grants interpreted the letters patent creating the township as including the land down to the river, which is the interpretation which their Lordships hold that they must bear.

The case as to the land of the plaintiffs which lies on the left bank of the river and is situated in the township of Denholm is substantially the same, but in this case the grant to the predecessor in title of the plaintiffs does not assist us. It merely describes the land granted as "the west half of the lot number thirty-eight in the first range of the aforesaid township of Denholm."

So that we are thrown back upon the letters patent creating that township in order to ascertain the position of the land thus granted. These letters patent are in the French language, but their purport is precisely the same as that of the letters patent creating the township of Low. The close correspondence may be judged from the following extracts which give the more material parts of the description of the lands included. The area is described as being "délimitée et décrite comme suit . . . . au nord par le township de Hincks, au sud par le township de Wakefield, à l'est, partie par le township de Bowman et partie par le township de Portland et à l'ouest par la rivière Gatineau," and in going over the metes and bounds it says: "De là, le long de la dite ligne extérieure sud du township de Hincks, plein ouest, six cent. quarante-quatre chaines, plus ou moins, jusqu'à

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la rive est de la rivière Gatineau, jusqu'à un poteau ou borne de pierre marquant l'angle sud-ouest du dit township de Hincks et l'angle nord-ouest de la dite étendue ou portion de terre. De là, le long de la rive est de la dite rivière Gatineau, dans une direction généralement sud-ouest et suivant ses sinuosités jusqu'au point de départ."

It will be seen that for all practical purposes the letters patent may be taken mutatis mutandis as mere translations the one of the other, so that the reasoning which has led their Lordships to the conclusion that the land of the plaintiffs in the township of Low is riparian applies with equal force to their lands in the township of Denholm and it is not necessary here to repeat it.

In some of the judgments in the Courts below the learned judges have held that the presumption that the bed of the river ad medium filum aquæ was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation. The application of the rule is strikingly illustrated in the latest case in which the point was considered in the House of Lords (*City of London Land Tax Commissioners* v. *Central London Railway* (1).) In that case the plots under consideration were described in language which undoubtedly represented them as plots terminating at the highway. In one instance the description was "Vacant ground formerly two houses and premises situate and known as Nos. 36 and 37, Newgate Street," and in another instance the description was "All those pieces of land now or formerly known as 85 and 86, Newgate Street, ... more particularly delineated and described on the plan hereto annexed

(1) [1913] A. C. 364.

marked A and thereon coloured pink," and on reference to that plan it was seen that the coloration stopped at the edge of the highway. Yet in all these instances their Lordships were unanimously of opinion that the rule ought to be applied, and that the lands up to the middle line of Newgate Street were included in the certificates of redemption of land tax.

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it ad medium filum aquæ or viæ the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land ad medium filum merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shewn as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise, according to English law, to the presumption in question.

The first question, therefore, must be answered in the plaintiffs' favour. There remains the question whether the presumption of English law that the bed of the stream ad medium filum aquæ belongs to the riparian proprietors holds good under the law of Quebec in the case of a river such as the river Gatineau.

Before examining into this question, their Lordships think it desirable to deal with some matters which figured prominently in the argument and undoubtedly affected greatly the mode in which the case was presented to the Board, although they do not determine the issues in the case.

In the first place it was spoken of as though it gravely affected

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the rights of the public, and indeed as though the success of the appeal would close the river Gatineau to them. Their Lordships recognize the importance of the case, but they cannot agree that it involves any such consequences. The rights of user of rivers for the purposes of navigation and the carriage of timber are independent of the ownership of the bed of the river, and whatever be the source from which they originally came are now protected by statutes which are very far-reaching in their provisions. For instance, in the Revised Statutes of Quebec, 1906, art. 7349 provides as follows: "2. It shall be lawful, nevertheless, to make use of any river or watercourse, lake, pond, ditch, drain or stream, in which one or more persons are interested, and the banks thereof, ... for the conveyance of all kinds of lumber, and for the passage of all boats, ferries, and canoes subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right and all fences, drains, or ditches damaged."

This is only one of many statutable provisions securing to the public the use of the rivers whatever be the private rights existing therein, and however this appeal be decided, these rights of the public will remain unaffected.

But this is not all. The rights of the public in the river Gatineau are not in any way put in issue in this case. The parties to this appeal are substantially at one on the question of the private ownership of the bed of the river Gatineau. The only difference between them is as to which of two private owners possesses it. The appellants contend that the portion of the bed of the river which is in question passed to their predecessors in title by the grants to Caleb Brooks in 1860 and 1865, and that to William Brooks in 1891. The respondent contends that it passed to the defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the river Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether, after such grants were made, they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Nothing, indeed, could be more foreign to the contentions of either party than to deny that the bed of the river Gatineau has largely passed into private hands. It was admitted that the townships of Hull and Wakefield include the bed of the river so far as it flows through them. The plots in those townships are rectangular, so that in the case of river lots the bed of the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of ad medium filum aquæ. Counsel for the respondent emphatically disclaimed the doctrine that the Crown could not alienate the river bed in precisely the same manner as any other public lands. But if this be the correct view of the law, we have here an example of a very simple case of the application of the presumption. A. being absolute owner of the land on the banks and the bed of the stream grants to B. a plot bounded by the stream. In such a case it is established law that the conveyance is construed as passing also the bed of the stream ad medium filum aquæ.

Notwithstanding the fact that the respondent admitted and indeed relied on the alienability of the river bed by the Crown the argument before this Board, as also the argument in the Courts below, turned largely on the provisions of art. 400 of the Civil Code of Lower Canada. This reads as follows: "Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea shore, lands reclaimed from the sea, ports, harbours and roadsteads, and generally all those portions of territory which do not constitute private property are considered as being dependencies of the Crown domain." As is the case with so many others, this section is taken almost unchanged from French sources, and, as is natural, the French text is the more helpful in arriving at the true interpretation. It reads as follows: "Les chemins et routes à la charge de l'Etat, les fleuves et rivières navigables et flottables et leurs rives, les rivages, lais et relais de la mer, les ports, les havres et les rades et généralement toutes les portions de territoire qui ne tombent que dans le domaine privé, sont considérées comme des dépendances du domaine public."

The principal aim of counsel for the respondent in the argument before this Board was to establish that the river Gatineau

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was a floatable river in order to bring it within the operation of this section, and the efforts of counsel for the appellants were to shew that it was not a floatable river and that, therefore, this section did not apply to it.

It is this part of the case which has given to their Lordships the greatest difficulty and anxiety. The importance attached to it in the judgments that were delivered in the Courts below claims for it the most careful attention. Nevertheless their Lordships cannot but feel that the parties have not fully appreciated the bearing of this article on their respective contentions. If its meaning be that the beds of navigable and floatable rivers are in their nature incapable of constituting private property and necessarily remain public, a decision that the river Gatineau is floatable within the meaning of this section would be as fatal to the validity of the grant which the respondent seeks to defend as it would be to the grants on which the plaintiffs base their title. If, on the other hand, the article means only that the beds of navigable and floatable rivers initially form part of the Crown domain, but that they, like other public lands, are alienable and may form the subject of grants by the Crown, the section is well nigh immaterial in the present case. The application of the principle of ad medium filum aquæ does not depend in any way on the nature or origin of the title of the grantor. Provided that the land on the banks and the bed of the river belong alike to the grantor and are alike alienable by him the principle applies.

One further matter must be borne in mind. There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in the cases where that bed is in its nature public property and therefore such presumption of ownership cannot exist. A perusal of the seigniorial decisions and the judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by reason of express words in the grants nor of any special rule of law formulated ad hoc, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were

held to form part of the domaine public and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognized. They are always spoken of as inalienables et imprescriptibles. So much of that jurisprudence as remains is to be found in art. 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property.

The interpretation of art. 400 appears to their Lordships to be a question of importance to the public so great that it can hardly be exaggerated. If it be the law that the beds of navigable and floatable rivers are public property incapable of being alienated, and that this principle has not been generally regarded in the actual Crown grants that have hitherto been made, the effect of a decision in the one way might have a widespread effect on the rights of individuals. On the other hand, a decision to the opposite effect must have a widespread effect on the rights of the public. In these circumstances their Lordships feel that it is desirable that a point of such importance should only be decided in some case in which the parties are respectively interested in the one and the other of the two rival interpretations so that there has been opportunity for full argument thereon. In the present appeal this has not been the case. Neither party was interested in supporting the interpretation that art. 400 means that the beds of navigable and floatable streams remain public property. Yet it is evident to their Lordships that this is a view of the section which cannot summarily be dismissed. The section clearly points to these lands standing in an exceptional position as contrasted with other lands. They are associated with specific types of land which are evidently intended to remain for all time the property of the State as contrasted with the individual, and the class is completed by the important category, "and generally all those portions of territory which do not constitute private property." In the face of all this it is impossible not to feel that there are great difficulties in accepting an interpretation which would leave them in the same position as to title and ownership as all other lands. On the other hand the proposition that the beds of these rivers, though

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of undoubted economic value, constitute a type of property which is vested in the Crown but which it cannot alienate presents very serious difficulties of another kind. It happens that the view which their Lordships take of the facts in this case renders it unnecessary that they should decide this point, and they, therefore, desire to make it plain that they express no opinion thereon, holding that it is more consonant with the practice of the Board to leave such a question to be dealt with in some case in which it is raised in a way which makes it essential to the decision of the case.

There remains the important question whether the river Gatineau is a river which comes within the words "navigable et flottable." If this is answered in the negative, the river bed does not come within the provisions of art. 400 of the Civil Code, and it becomes unnecessary to consider the difficulties which that article presents.

This question is a mixture of fact and law. So far as fact is concerned the material for its decision consists mainly of the finding of the learned judge at the trial that the "river is floatable only for loose logs (flottable à bûches perdues), and that it is not floatable for cribs or rafts (flottable en trains ou radeaux)," which their Lordships accept in its entirety. In addition to this there are, of course, certain facts as to the magnitude of the Gatineau, the nature of its bed, and of the flow of water in it at various periods of the year. On these matters there is no dispute between the parties. The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water that goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness.

That such a river is not navigable is evident, and it was indeed practically conceded by the respondent's counsel in the argument before us. The contest raged round the word "flottable," and a great wealth of legal knowledge and research

was displayed on both sides, and a mass of material of very unequal value bearing upon it was placed before their Lordships. The outcome seems to them to be as follows: It is abundantly clear that the distinction between the legal status of the beds of streams which were "navigable et flottable" and the beds of other streams existed in French jurisprudence long prior to the compilation of the Code Napoléon. The former belonged to the domaine public, while the latter belonged to the riparian owners ad medium filum aquæ. Accordingly, when the Code Napoléon was compiled the law in this respect was expressed in art. 538 in language identical with that which is now found in art. 400 of the Canadian Civil Code. But although the law was thus authoritatively formulated there was great diversity of opinion as to its meaning. One school of lawyers insisted that streams that were only flottables à bûches perdues were within the article and others denied it. On the whole, the balance of authority was greatly in favour of the latter, and in 1823 the Court of Cassation gave a decision in that sense. But even this did not settle the matter, and conflicting decisions were given in the different Courts. At length, in 1898, the Legislature put an end to the confusion by passing a law that streams should not be considered flottables if they were only flottables à bûches perdues, and, speaking generally, the authorities treat this as being a declaration of the law in accordance with the better opinion prevailing at the time. All this legal history, although interesting, can have no substantial bearing on the present case. The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoléon and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law. Still less can it be suggested that the decision of the French Government to end disputes by a statute can have any weight in the matter. The only conclusion that can legitimately be drawn from the above chapter of French legal history is that the meaning of the word "flottable" was very uncertain in French jurisprudence at the critical date when French law became recognized as the basis of the law of the Colony of Canada, but that there was certainly no

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consensus of opinion that a river was flottable in a legal sense if it was only flottable à bûches perdues in fact.

Nor, in their Lordships' opinion, is much light to be derived from the decisions during the period between 1791 and the extinction of the feudal rights in Lower Canada in 1854. Judging from the material presented to their Lordships in the argument, there seems to be no very settled jurisprudence, and no doubt many questions remained in a state of uncertainty. The case of *Oliva* v. *Boissonnault* (1) in 1832 is of value from this point of view. We there find the judges of first instance treating "floatable" as equivalent to "capable of floating logs or rafts." But the Court of Appeal doubted the correctness of this view, and Reid C.J., in giving the judgment of the Court, indicates that in their opinion "flottable" was not applicable to a river which could only float logs. They evidently inclined to the view that "flottable" as applied to a river implied that it was ranked among navigable rivers "portant bateaux et radeaux pour le transport du bois et autres marchandises," a view which, as will presently appear, has subsequently received the support of high authority. But, speaking generally, no substantial help is obtained until we come to the inquiry which took place under the authority of the Seigniorial Act of 1854.

By that Act certain commissioners were appointed to settle the value of the seigniorial rights which were about to be abolished, and for that purpose to draw up schedules of such rights in each case. In order to settle the numerous legal questions which must necessarily arise in the performance of their duties, the judges of the Court of Queen's Bench and the Superior Court for Lower Canada were erected into a tribunal to decide such questions, and the Attorney-General and the parties interested were entitled to appear before that tribunal and submit questions to it for decision. They might also submit their own views as to what the answers ought to be in the shape of legal propositions which they asked the Court to declare to be the answers to the questions put. After thus hearing the rival contentions, the Court had to decide what was the proper answer. In this way a body of decisions of the highest authority as to the law then

(1) Stuart's Lower Can. Rep. 524 and 564.

prevailing in Lower Canada was collected, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them.

Turning to these seigniorial decisions, and the judgments of the individual judges which accompany them, one cannot find any specific reference to the status of the beds of rivers which were only "flottables à bûches perdues." But on the other hand, one finds clear statements that the seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes, and to the ad medium filum rule. Some of the judges used the single term "non-navigable" and some (among whom is Sir Louis Lafontaine C.J.) used the more exact phrase "non-navigable and non-flottable." But a perusal of these able and exhaustive judgments makes it abundantly clear that this difference of phraseology does not indicate any difference of opinion. Indeed, the agreement between the members of the tribunal on important questions is very striking. In truth "non-flottable" was looked upon as a special form of "non-navigable" and the word was evidently put in by those who used it for the purpose of preventing its being thought that the only form of navigation contemplated was by ships (naves). The word "flottable," therefore, referred to navigation by cribs or rafts (en trains ou radeaux). In this connection the judgment of Day J. (Seign. Quest. B. 51e) is instructive. After using the single term "navigable" throughout he says: "Ces observations s'appliquent également aux rivières flottables propres au transport des objets de commerce." Even if their Lordships had to rely alone on these seigniorial decisions they would come to the conclusion that the Courts that pronounced them were of opinion that a river that was utilizable only by flotation "à bûches perdues" was not navigable or floatable, and that its bed was the subject of private property.

But on this point their Lordships are not left to mere inference. In the year 1859 the case of *Boswell* v. *Denis* (1) came before a Court presided over by Chief Justice Sir Louis Lafontaine, who took a

(1) 10 Lower Can. Rep. 294.

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leading part in deciding the seigniorial questions. This was only three years after the decision of the seigniorial questions, and it related to a river as to which the judge at the trial reported "that the proof clearly established that the river was neither floatable nor navigable but that it was merely flottable à bûches perdues." This being the finding in fact the Chief Justice says in his judgment that it had been already proved that the river was neither navigable nor floatable, and that, according to the decision of the Seigniorial Court, such rivers were held to belong to the riparian proprietors. Four other members of the Court had also been members of the Seigniorial Tribunal, and though one of them dissented, it was apparently on the effect of the evidence and not on the point of law. Their Lordships consider that this decision justifies them in regarding the answers to the seigniorial questions as meaning that rivers were not flottable in the legal sense of the term if they were only so à bûches perdues.

Finally, this precise question came on appeal before the Supreme Court of Canada, in the year 1907, in the case of *Tanguay* v. *Canadian Electric Light Co.* (1) Very learned judgments were pronounced in that case, indicating a wide difference of opinion among its members, but the Court, by a majority consisting of the Chief Justice and Davies, McLennan, and Duff JJ. (Girouard and Idington JJ. dissenting), decided that rivers which were only flottables à bûches perdues were not "flottables" in the legal sense of the word, and, therefore, did not come within art. 400 of the Code. Their Lordships are of opinion that this decision was right. The elaborate reasoning which is to be found in the judgment of the Chief Justice in this case (with which their Lordships agree) renders it unnecessary to go more in detail into this question.

No doubt there are to be found decisions to the contrary in some of the Courts during the period between 1854 and the decision of the case of *Tanguay* v. *Canadian Electric Light Co.* (1) in the Supreme Court. But these decisions are of inferior authority, and it will be found on examination that the real question in issue in those cases was not the ownership of the bed of the river, but the rights of the public to use the river for

(1) 40 Can. S. C. R. 1.

commerce, which is a different question depending on wholly different principles.

It follows, therefore, that the river Gatineau, so far as is material to this case, does not come within art. 400 of the Code, and consequently it is not necessary to construe that section. It also follows that, inasmuch as their Lordships are of opinion that the grants under which the plaintiffs hold fully establish their title to those portions of the bed of the river which are in issue, judgment ought to have been given for the appellants in the Court below. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed. The orders of the Supreme Court and the Court of King's Bench will accordingly be set aside, and the judgment of Champagne J. restored. The respondent will pay the costs of the appellants in all the appeal proceedings, including the appeal to this Board.

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Solicitors for appellants: *Norton, Rose, Barrington & Co.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

STATE OF SOUTH AUSTRALIA . . . . APPELLANT;

AND

STATE OF VICTORIA . . . . . RESPONDENT.

J. C.* 1913 *Nov.* 20, 21, 24, 26. 1914 *Jan.* 28.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Boundary of States—Letters Patent creating Province—Degree of Longitude stated as Boundary—Implied Authority of Executives to locate.

By letters patent, dated February 19, 1836, and made in exercise of powers given by 4 & 5 Will. 4, c. 95, the King in Council erected and established the Province of South Australia (now the appellant State) and declared that its boundary on the east (on which side it adjoined New South Wales) should be the 141st degree of east longitude. Under an agreement between the Governments of New South Wales and South Australia the supposed position of that longitude was marked upon the ground for 123 miles north from the sea, and proclamations were issued in the two Colonies publishing the line so marked as the boundary. This marked line was afterwards extended,

* *Present:* VISCOUNT HALDANE L.C., LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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under agreement between the two Governments, as far as the river Murray. The Secretary of State for the Colonies approved what had been done. The line so marked was subsequently found to be about 2¼ miles to the west of the true position of the 141st degree. The Colony of Victoria (now the respondent State) was created in 1850 out of part of New South Wales and so that on the west it adjoined South Australia so far north as the river Murray. The appellant State brought an action in the High Court of Australia claiming possession of the land between the boundary agreed and marked as above stated and the 141st degree of east longitude, and for ancillary relief:—

Held that, upon the true construction of the letters patent, it was contemplated that the 141st degree of east longitude should be ascertained and represented upon the surface of the earth, and that there was implied authority given to the Executives of the two Colonies to do such acts as were necessary to that end; that, upon the facts, the Executives of the two Colonies had acted within that implied authority, and that the line agreed and marked became and was the boundary between the States; and that the action was, accordingly, rightly dismissed.

APPEAL from a judgment of the High Court of Australia (May 22, 1911) after a trial at Bar.

The action was brought by the appellant State to recover possession of a strip of land about 2¼ miles in width along the border between the territories of the appellant and respondent States, and for ancillary relief.

The facts are fully stated in the judgment of their Lordships. The question at issue between the parties appears from the following short statement. By letters patent dated February 19, 1836, in exercise of powers contained in 4 & 5 Will. 4, c. 95, the King in Council erected and established a Province to be called the Province of South Australia. The letters patent declared the boundary of the Province on the east to be the 141st degree of east longitude. During the years 1845—1847 the necessity for having the boundary ascertained and marked on the ground, so that the limits of jurisdiction of the respective Governments might be defined, became pressing. Correspondence took place between the Governments of New South Wales and of South Australia resulting in an agreement in pursuance of which the Governor of New South Wales appointed Mr. Wade, a surveyor, to undertake the duty "of marking the line of boundary," and the Lieutenant-Governor of South Australia appointed one

Mr. White, as the representative of South Australia, to accompany and assist Mr. Wade and to report to the Government of that Colony. Mr. Wade surveyed and marked the boundary northwards for about 123 miles by blazing trees and erecting mounds of earth. On December 16, 1847, the Lieutenant-Governor of South Australia published a proclamation which described Wade's line as marked on the ground and stated that it was more particularly described in the schedule annexed to the proclamation and was delineated on the public map deposited at the Survey Offices at Adelaide, and declared that that line should be deemed and construed to be the eastern boundary of the Province of South Australia. On March 4, 1849, the Governor of New South Wales published a proclamation in similar terms adopting and making known the line marked by Wade and declaring it as the boundary between the Provinces.

The Secretary of State for the Colonies, upon being informed of what had been done, signified his approval and urged that the line should be extended northwards to the river Murray. In 1849 Mr. White was appointed, under an agreement between the two Governments, to carry out this extension of the marked line, and this work was completed in 1850. In 1850 the Port Phillip district of New South Wales was erected into a separate Colony by the Imperial Act 13 & 14 Vict. c. 59, under the name of the Colony of Victoria, with the result that that which had previously been the boundary between South Australia and New South Wales, south of the river Murray, became the boundary between the former and the Colony of Victoria (now the respondent State). It was admitted that Wade's line was in fact about $2\frac{1}{4}$ miles to the west of the true position of the 141st degree of east longitude. From 1868, when the inaccuracy of the boundary as fixed was first discovered, until the commencement of the action a considerable amount of correspondence and negotiations took place between the Governments of South Australia and Victoria. The general effect of that correspondence was that the former State from time to time endeavoured to get the boundary line rectified either by agreement or by submission to the Privy Council, while the latter State maintained that the locating of the boundary above referred to was final and conclusive.

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The case came on for hearing in the High Court on February 20, 1911, and the following days. The defendant (respondent) State contended, inter alia, that the High Court had no jurisdiction, on the ground that the dispute was not of a justiciable nature, but one to be determined by the King in Council as a political or administrative act, and that it was therefore not within s. 75 of the Commonwealth of Australia Constitution Act, 1900. The High Court delivered judgment on March 22, 1911. The majority of the Court, namely, the Chief Justice, Barton J., O'Connor J., and Isaacs J., determined that the Court had jurisdiction, but that the defendant (respondent) State was entitled to succeed for reasons set out in their judgments. Higgins J. dissented; he expressed strong doubts as to whether the Court had jurisdiction, and considered that if it had the plaintiff State was entitled to some of the relief prayed for. The judgments of the learned judges are fully reported at 12 C. L. R. 667.

P. O. Lawrence, K.C., E. E. Cleland, K.C., and *Whinney*, for the appellant. The boundary was fixed as the 141st degree of east longitude by and under the 4 & 5 Will. 4, c. 95, and that is recognized as being the boundary by 1 & 2 Vict. c. 60 and by 18 & 19 Vict. c. 55. The boundary so fixed could only be varied by an act of the Imperial Parliament, and the Government of the two Colonies had no power to agree to a different boundary line. The Imperial statute 24 & 25 Vict. c. 44, by s. 5, expressly empowers the Governors of contiguous Colonies in Australia to determine and alter their boundaries. This indicates that apart from that provision there is no power in the Governors to do so. The inconvenience arising from the uncertainty as to the true position of the boundary does not shew that a power to agree to a fixed boundary should be implied, for in the absence of agreement the inconveniences would still remain. If there was any implied authority to locate the 141st degree it was to do so accurately, in the sense that the line fixed should be within the margin of scientific accuracy at the time and not so as to be then capable of being demonstrated as inaccurate. The evidence shews that Wade's line not only was inaccurate, but was not within the margin of scientific accuracy attainable when it was laid down.

The evidence does not establish that Wade's line was agreed as the permanent boundary; it was merely a provisional or conventional boundary which did not vary the true boundary as fixed under the statute. The preamble to 1 & 2 Vict. c. 60 was not only a recognition but also an interpretation of the previous Act and the letters patent, and the question now is simply one of parcel or no parcel, as in *Lyle* v. *Richards*. (1) The decisions in the United States as to boundaries between States, such as *Maryland* v. *West Virginia* (2), are distinguishable, since those States are independent sovereign Powers and could mutually agree their boundaries, subject to the sanction of Congress: *Poole* v. *Fletcher*. (3) [Reference was also made to *Penn* v. *Lord Baltimore*. (4)]

Sir R. Finlay, K.C., E. F. Mitchell, K.C., A. P. Poley, and *W. A. Barton,* for the respondent. Upon the proper construction of 3 & 4 Will. 4, c. 95, and the letters patent authority was given by necessary implication to some person or persons to locate and mark out on the surface of the ground the 141st degree, so far as it could reasonably be ascertained. The majority in the High Court rightly found upon the evidence that the necessity to do this had arisen, and that the position was bona fide ascertained and marked by agreement between the Governors of the two Colonies. The Governors, being upon the spot and conversant with the local conditions, were the right persons to exercise the implied authority. If, however, the implied authority was one to be exercised by the Sovereign, then it has been so exercised, since what was done received the approval of the Secretary of State. The subsequent ratification of what had been done amounted to a command: *Buron* v. *Denman*. (5) Orders in Council are not the sole method of carrying the Royal will into effect: *Cameron* v. *Kyte*. (6) That an authority to locate the boundary must be implied appears from the considerations that it could not have been intended that the boundary was to be one of which the determined position would vary according as the accuracy of scientific calculations increased, and that

(1) (1866) L. R. 1 H. L. 222.
(2) (1910) 217 U. S. 1.
(3) (1837) 11 Peters, 185, at p. 206.
(4) (1750) 1 Ves. 443.
(5) (1848) 2 Ex. 167.
(6) (1835) 3 Knapp, 332, at p. 346.

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serious inconveniences in administration necessarily resulted from the true position of the boundary being a matter of uncertainty. The boundary fixed by agreement was intended to be permanent and it has been recognized by the Imperial Legislature in, among other Acts, 13 & 14 Vict. c. 59, the statute creating the Colony of Victoria. At the time of the passing of the Commonwealth of Australia Act, 1900, the Colony of Victoria was exercising jurisdiction over the disputed strip of territory, and ss. 107 and 123 of the Constitution, enacted by that statute, must be regarded as a confirmation by the Legislature. [Reference was also made to the proceedings upon the question of the boundary of Ontario before the Privy Council, published by order of the Legislative Assembly, Toronto, 1884.]

P. O. Lawrence, K.C., in reply. The letters patent fixed the boundary and cannot be construed as a mere executory order to fix it. The approval of the Secretary of State was not an exercise of the Royal prerogative, which has to be by a personal act under the Sign Manual: Chitty's Prerogatives of the Crown, p. 9.

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The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal by the State of South Australia from a judgment of the High Court of Australia, dated May 22, 1911, in proceedings instituted by the State of South Australia against the State of Victoria substantially for the purpose of settling a disputed boundary between the two States. The portion of the boundary between the two States which is in question stretches northward from the coast to the Murray River.

The judgment of the majority of the High Court was in favour of the defendants, the State of Victoria, and accordingly on May 22, 1911, the action was dismissed, and it is from this decision of the High Court that the present appeal is brought.

In the course of the proceedings before the High Court the history of the question of the boundary between South Australia and Victoria was minutely examined both in respect of law and of fact, and all relevant documentary and oral evidence was adduced and is now to be found in the record, and their Lordships feel that all the material that could be serviceable for

deciding the question in dispute has been laid before them, and that in the argument of the appeal the legal effect of the various Acts of Parliament, documents, and acts of the parties has been fully and ably discussed. The result of the discussion has been to lead their Lordships to the conclusion that the important questions involved can be decided on broad general principles independent of much that has thus been brought before them. In giving the reasons for their judgment on this appeal their Lordships do not propose to refer to matter which does not bear directly upon those reasons, but their not referring to such matter must not be understood as meaning that in their opinion it was not relevant or that it was not such as was proper to be brought forward in the case. The nature and importance of the dispute made it one in which it was of the highest importance that the tribunal should feel assured that all relevant material had been fully brought forward.

The history begins with the Act 4 & 5 Will. 4, c. 95, which was passed on August 15, 1834. The title of this Act is: "An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof." The preamble of this Act is so important to the decision of the present case that it is advisable to cite it here in full. It reads as follows: "Whereas that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude, and between the Southern Ocean and twenty-six degrees of south latitude, together with the islands adjacent thereto, consists of waste and unoccupied lands which are supposed to be fit for the purposes of colonization: And whereas divers of His Majesty's subjects possessing amongst them considerable property are desirous to embark for the said part of Australia: And whereas it is highly expedient that His Majesty's said subjects should be enabled to carry their said laudable purpose into effect: And whereas the said persons are desirous that in the said intended Colony an uniform system in the mode of disposing of waste lands should be permanently established: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and

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Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for His Majesty, with the advice of his Privy Council, to erect within that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude, and between the Southern Ocean and the twenty-six degrees of south latitude, together with all and every the islands adjacent thereto, and the bays and gulfs thereof, with the advice of his Privy Council, to establish one or more Provinces, and to fix the respective boundaries of such Provinces; and that all and every person who shall at any time hereafter inhabit or reside within His Majesty's said Province or Provinces shall be free, and shall not be subject to or bound by any Laws, Orders, Statutes, or Constitutions which have been heretofore made, or which hereafter shall be made, ordered, or enacted by, for, or as the Laws, Orders, Statutes, or Constitutions of any other part of Australia, but shall be subject to and bound to obey such Laws, Orders, Statutes, and Constitutions as shall from time to time, in the manner hereinafter directed, be made, ordered and enacted for the government of His Majesty's Province or Provinces of South Australia."

By clause II. power is given to His Majesty with the advice of his Privy Council to make or to authorize and empower any one or more persons resident and being within any one of the said Provinces to make, ordain, and establish all such laws and to constitute such Courts and to levy such rates, duties, and taxes as may be necessary for the peace, order, and good government of His Majesty's subjects and others within the said Province subject to certain conditions set forth in such section.

The Act goes on to authorize His Majesty to appoint three or more fit persons to be commissioners to carry certain parts of the Acts into execution. It provides the commissioners with a seal and empowers them to declare lands of the Province to be public lands open to purchase by British subjects and to make orders and regulations for the surveying and sale of such public lands; and finally by s. 23 His Majesty is empowered by and with the advice of his Privy Council to frame, constitute, and establish a Constitution of local government for any such Province.

While the above Act was in force, and acting under the powers given by the same, His Majesty William IV. proceeded to erect South Australia into a British Province. The letters patent embodying and for the purposes of this case constituting the Order in Council effecting this are dated February 19, 1836.

[Their Lordships' judgment set out the Order in Council in full; after reciting the above preamble and provisions of 4 & 5 Will. 4, c. 95, it ordered as follows: "now know ye that with the advice of our Privy Council, and in pursuance of the exercise of the powers in us in that behalf vested by the said recited Act of Parliament we do hereby erect and establish one Province to be called the Province of South Australia, and we do hereby fix the boundaries of the said Province in manner following (that is to say) on the north the 26th degree of south latitude, on the south the Southern Ocean, on the west the 132nd degree of longitude, and on the east the 141st degree of east longitude including therein all and every the bays and gulfs thereof together with the island called Kangaroo Island, and all and every the islands adjacent to the said last mentioned island, or to that part of the mainland of the said Province."]

It may be convenient in this connection to state what is the admitted position of the boundary contended for by Victoria. It is situated about two miles and a quarter to the west of the true meridian of 141 degrees of east longitude, so that it is common ground that the Province of South Australia so bounded would be within the area in which the Crown was authorized to erect a British Province or Provinces under the statute 4 & 5 Will. 4, c. 95.

In 1838 the Act 1 & 2 Vict. c. 60 was passed to amend the Act 4 & 5 Will. 4, c. 95, by making certain alterations therein with regard to the powers of the commissioners and other matters which are not relevant to the present appeal. Reliance was, however, put upon this Act by the appellants on the ground that in its preamble it refers to the erection of South Australia into a Colony under letters patent of February 19, 1836, and describes the boundaries in the same language as is used in the letters patent themselves. The appellants contend that this is a statutory recognition that the eastern boundary of South

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Australia is the meridian of 141 degrees east longitude, and that even if the letters patent themselves had not the force of a statute (which they contend such letters patent in fact possessed by virtue of their being based upon the statute 4 & 5 Will. 4, c. 95, and being an Act of the Crown authorized thereby) the effect of this reference to the boundaries in 1 & 2 Vict. c. 60 would be to make the meridian of 141 degrees east longitude the statutable boundary between the Provinces. A similar type of argument is put forward by the respondents, based upon similar references in documents of authority in which the reference is to the eastern boundary of South Australia at dates when a recognized boundary existed which was the same as that now contended for by Victoria, and the respondents claim that this is an authoritative recognition of it as the de facto boundary. Their Lordships are not disposed to give much weight to arguments of this kind. It is beyond contest that the boundary as fixed by letters patent was the meridian of 141 degrees east longitude, and that no one intentionally accepted or referred to any other line but this as the boundary, or that if any one did so his so doing would have no effect whatever. The real question in the case in their Lordships' opinion lies much deeper and cannot be affected by such references however made during the time when it was not known that the de facto boundary did not coincide precisely with the exact position of the meridian of 141 degrees east longitude.

On July 30, 1842, the Act of 5 & 6 Vict. c. 61 was passed. It is entitled An Act to provide for the better government of South Australia. It repealed entirely the Acts of 4 & 5 Will. 4, c. 95, and 1 & 2 Vict. c. 60, with the saving clause—" That all Laws and Ordinances heretofore passed under the authority and in pursuance of the said recited Acts or either of them and that all things heretofore lawfully done in virtue of the said Acts or of either of them shall hereafter be of the same validity as if the said Acts had not been repealed," with a reservation which is not relevant to the present appeal. The same may be said of the actual provisions of the Act which substantially amount to a re-enactment of the provisions of the repealed Acts with various changes of detail as to the number of the

commissioners, &c. The Act contains no specific reference to boundaries.

Reference was made in the argument to two statutes relating to the sale of waste land belonging to the Crown in the Australian Colonies which were respectively passed in 1842 and 1846. They are 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104. In their Lordships' opinion the sole relevance of these statutes is that they shew that the sale and leasing of public lands in the Colonies were proceeding at this time, and were the subject of legislative regulation. The power of thus dealing with the lands of each Colony was in the hands of the Governor of the Colony in which they were situated subject to various rules and regulations made by the Crown. It is obvious, therefore, that it was a practical necessity that the boundaries of the various Colonies should be defined and known. But otherwise the provisions of these Acts do not bear upon the question before their Lordships.

By this time the practical difficulties arising from the uncertainty of the boundary between the two Colonies of South Australia and New South Wales were becoming manifest to the persons in authority in the Colonies themselves. On September 30, 1844, Governor Grey, of South Australia, writes a despatch to the Colonial Secretary calling his attention to the very imperfect manner in which the eastern and western boundaries of the Provinces were defined. He suggests that the boundary of the meridian of 141 degrees east longitude should be abandoned, and natural landmarks arising from the features of the country itself (mainly rivers and lakes) substituted therefor. Such an admitted departure from the boundary as fixed by the letters patent would certainly have required either Imperial legislation or an exercise of the prerogative of the Crown, if indeed the latter mode would have sufficed, a question which it is not necessary to decide. No proposal of this kind would be practicable without the assent of both Colonies, and therefore the Colonial Secretary submits the proposition to the Governor of New South Wales, who, although agreeing with Governor Grey's view of the necessity of determining and clearly defining the boundary, does not accept his solution, and the suggestion was therefore abandoned.

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From about this date commence the important steps that were taken by the two Colonies to put an end to the inconvenience arising from the uncertainty of the boundary between them. It is evident that the difficulty with regard to the administration of the law was making itself felt. The lands near the boundary were being taken up. In a letter of July 15, 1846, from one of the Commissioners of the Crown Lands Office to the Colonial Secretary is to be found the following passage, which vividly illustrates this: "I would beg leave to call His Excellency's" (i.e., the Lieutenant-Governor) "attention to the necessity of having the eastern boundary of the Province at least approximately defined as soon as possible. The country through which it passes is now occupied for seventy miles from the coast, and there are at least twelve or fourteen settlers whose runs lie so near the boundary line that I considered my jurisdiction over them uncertain, and therefore refrained from interfering with them. The loss to the revenue is not the only evil resulting from the want of a defined boundary. A number of bad characters resort to this neutral ground, knowing that the police cannot interfere with them until the question of jurisdiction is determined."

That this description is not exaggerated is evident from a letter written about the same date by the Lieutenant-Governor of South Australia to the Governor of New South Wales, referring to murders in the vicinity of the undefined boundary.

The outcome of this state of things was that communications passed between the Governors of South Australia and New South Wales on the subject of the determination of the boundary by a joint survey. The exact nature of the steps taken is clearly seen from the documents before their Lordships. On October 26, 1846, the Lieutenant-Governor of South Australia wrote to the Governor of New South Wales a letter enclosing a copy of a letter which he had received from Captain Frome, the Surveyor-General of South Australia.

[Their Lordships' judgment set out the letter from Captain Frome, which recommended the adoption of a proposed plan whereby the duty of marking the 141st meridian should be confided to a surveyor selected by the Government of New South Wales, and that some person on behalf of the Government of

South Australia should accompany the survey party, not as a surveyor, but to report upon the progress of the work and the nature of the country.]

The enclosing letter concludes thus: "The difference of a few seconds of longitude one way or other does not appear to me to be of any other importance than that, as the Imperial Parliament has decided that the boundary shall lie on the 141st meridian of east longitude, it remains for us to ascertain that meridian by the best means in our power to prevent future litigation among the occupiers of the soil."

To this letter the Governor of New South Wales replied on December 30, 1846. [Their Lordships' judgment set out this letter, whereby the Governor stated that, in compliance with Captain Frome's suggestion, he had directed a competent surveyor with a sufficient party to proceed to the mouth of the Glenelg.]

The person instructed by the Governor of New South Wales to make this survey was Mr. Wade, and the person instructed to accompany him on behalf of South Australia was Mr. White. Both appointments were made in January, 1847. Their Lordships have no doubt that under the difficulties of the situation Mr. Wade carried out his work in a very commendable way. He sent full reports of his progress, and there is abundant evidence that what he did met with approval on all sides. When his survey reached the 36th parallel of south latitude he was obliged to suspend it for a while. The reports of Mr. White, who accompanied him on behalf of South Australia, shew that he was in complete agreement with Mr. Wade in the matter of the survey.

It is now necessary to refer to the materials which Mr. Wade possessed for the purpose of his guidance in the survey. To trace the 141st meridian east longitude it was sufficient to ascertain the point where that meridian struck the south coast and to proceed from that point in a due northerly direction. The position of this point could even at that date be obtained by two or three independent methods, all depending on astronomical observations. Of these, the method of lunar observations would be direct, i.e., independent of the accuracy of the determination

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of the longitude of any other place. The two other methods in use at the time, i.e., triangulation and chronometric observations, resulted only in determinations of the difference of longitude of the place of observation and of some known point with respect to which the triangulation and the chronometric observations were made. Observations of all three kinds had already been made, the most important being those of Mr. C. J. Tyers in 1839. In these observations Fort Macquarie, Sydney, was taken by Mr. Tyers as his point of departure, and he assumed its longitude to be 151° 15′ 14″, which was the accepted value at the time. Other observations had been made by Captain Stokes by chronometric observations. These two determinations were in the hands of Mr. Wade for his guidance, either at or shortly after the commencement of his labours, and must equally have been known to Mr. White, who was throughout in possession of complete knowledge of all the steps taken by Mr. Wade.

It will be necessary later to point out more in detail the impossibility of ascertaining with absolute certainty the position on the surface of the earth of an astronomical line such as a meridian. It is sufficient here to say that all these determinations differed slightly. One element which vitiated their accuracy was that the assumed longitude of Fort Macquarie was slightly incorrect, as was shewn many years afterwards by a series of lunar observations made in the Sydney Observatory. But although this error was unknown at the time, it is quite clear that the Governors of both States were aware of the differences that existed in the determination of the starting point of the survey and realized that the existence of such differences must necessarily be anticipated. It is evident, therefore, that their action was consciously based on these considerations. In the letter of December 30, 1846, already referred to, the Governor of New South Wales, writing to the Lieutenant-Governor of South Australia, expresses himself on this subject as follows:

"With respect to the difference of a few seconds of longitude between Captain Stokes and Mr. Tyers as to the position of the Glenelg River, as stated by Captain Frome in his letter of the 22nd October, enclosed in your Excellency's despatch of the 26th of that month, I apprehend that the best means in our

power to ascertain the 141st meridian of east longitude, so as to meet the provisions of the Imperial Act, will be to direct the surveyors employed to strike a mean between the calculations of Captain Stokes and Mr. Tyers."

Instructions to this effect were formally given to Mr. Wade by the Superintendent Surveyor for New South Wales in a letter of January 28, 1847. [Their Lordships' judgment set out this letter, which repeated the terms of the Governor's letter of December 30, 1846, and added "should the gentleman who is to join you from South Australia have been provided with similar directions this circumstance you will, of course, consider as the confirmation of the present instructions on this subject."]

Although it was originally intended to take the mean of the determinations of Mr. Tyers and Captain Stokes, the results of Captain Stokes were, unfortunately, not sent to Mr. Wade in time, and he was compelled to adopt the determination of Mr. Tyers as his basis. Their Lordships are unable to say whether this in any way increased the error of the actual determination, but it is quite evident that the action of Mr. Wade was communicated to and approved of by the Governors of both States. For example, by a letter to the Colonial Secretary, Adelaide, from Mr. White, dated April 15, 1847. [This letter was set out in their Lordships' judgment.]

On October 20, 1847, the Colonial Secretary for New South Wales transmitted to the Colonial Secretary for South Australia the reports made by Mr. Wade upon the boundary line so far as he had surveyed it before being compelled to desist, i.e., to the 36th degree of latitude. The letter concludes as follows: "In forwarding these documents, I am also directed to inform you that Sir Charles Augustus FitzRoy concurs with his Honour the Superintendent in opinion that the object of the survey appears to be sufficiently attained for all practical purposes at present, and to suggest for the consideration of the Lieutenant-Governor that, in accordance with the Superintendent's recommendation, 'the boundary lines surveyed by Mr. Wade from the coast to the 36th degree of latitude' should be adopted and proclaimed 'as the recognised boundary line' as far as it extends between the respective dependencies."

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In the following December the Lieutenant-Governor of South Australia proclaimed the boundary so marked out. [Their Lordships' judgment set out the Proclamation in full. After reciting the provisions of 4 & 5 Will. 4, c. 95, and the Order in Council of February 19, 1836, it proceeded as follows: "And whereas from the progress of settlement on the eastern frontier of the said Province, and on the borders of the territory of New South Wales, it has become necessary to mark out and ascertain the 141st degree of east longitude, so fixed as the boundary of South Australia on the east as aforesaid; and for this purpose, by an arrangement previously entered into, the Government of New South Wales has, with the consent and concurrence of the Government of South Australia, caused the position of the 141st meridian of longitude, east from Greenwich, to be correctly ascertained at a spot on the sea coast near the mouth of the river Glenelg; and, therefrom, the said meridian to be surveyed northward as far as the 36th parallel of south latitude, by Henry Wade, Esquire, surveyor, and to be marked upon the ground by a double row of blazing upon the adjacent trees, and by mounds of earth at intervals of one mile where no trees exist.

"And whereas it is expedient that the said survey should be authoritatively adopted and made known.

"Now therefore, by virtue and in pursuance of the power and authority to me confided, I, the Lieutenant-Governor aforesaid, in name and on behalf of Her Most Gracious Majesty, do hereby notify, and proclaim, that the line so marked as aforesaid, and particularly described in the schedule hereto annexed, and delineated on the public maps deposited at the Survey Office, at Adelaide, as the meridian of the 141st degree of east longitude, is and shall be deemed and construed to be the eastern boundary of the Province of South Australia, to all intents and purposes; and all and singular Her Majesty's Officers, Ministers, and subjects in the said Province, and all others whom it may concern, are required to take due notice hereof accordingly."]

In the schedule there was a clerical error whereby "one quarter of a mile east" appeared instead of "one and a quarter mile west." Their Lordships attach no importance to this

because it is evident that the rest of the schedule would shew that the error was a clerical one, and would enable it to be corrected. For instance, it gives the physical marks by which the boundary was marked out, commencing with the statement: "At about half a mile due north from the starting point a pyramid of stones is erected with a post in the centre marking the line of boundary." This would at once enable the erroneous description of the point from which the boundary line started on the coast to be recognized as a misdescription and corrected. But on learning of the existence of this clerical error within two or three days after the Proclamation, the Governor of South Australia ex abundanti cautela issued a Proclamation correcting the error, a precaution which, though in their Lordships' opinion unnecessary, was very proper under the circumstances. Both these Proclamations were forwarded to the Governor of New South Wales, and on March 2, 1849, the said boundary was proclaimed by the Governor of New South Wales.

[Their Lordships' judgment set out the Proclamation in full. After reciting the provisions of 4 & 5 Will. 4, c. 95, the Order in Council of February 19, 1836, and that an arrangement had been entered into with the Government of South Australia under which the 141st degree of east longitude had been correctly ascertained, it proceeded: "Now, therefore, I, Sir Charles Augustus FitzRoy, as such Governor as aforesaid, do hereby notify and proclaim the lines so marked and surveyed, and particularly described in the schedule hereto annexed, and delineated on the public maps in the Survey Office in Sydney and Melbourne respectively, shall be deemed and construed to be the boundary line between the said territory of New South Wales and the Province of South Australia respectively as far as the same extends."]

It is common ground that the schedules, though couched in slightly different language, are for all practical purposes identical.

Information of the establishment of a boundary line between the Colonies of New South Wales and South Australia, together with a copy of the proclamation of that line by the Lieutenant-Governor of South Australia above referred to, was sent by the

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Governor of New South Wales to Her Majesty's Secretary of State for the Colonies, who acknowledged it by a letter of May 17, 1848, in the following terms :—

"Downing Street,
"17th May, 1848.

"Sir,

"I have to acknowledge the receipt of your despatch, No. 7, of the 8th January last, announcing that [*sic*] the establishment of a boundary line between the Colonies of New South Wales and South Australia, and enclosing the copy of a proclamation of the Lieutenant-Governor of that Colony upon the subject.

"In reply, I have to signify to you my approval of the care with which this work appears to have been accomplished.

"(Signed) Grey."

This was followed up by another letter from Her Majesty's Secretary of State for the Colonies, dated June 30, 1848, which reads as follows :—

"Downing Street,
"31st June, 1848.

"Sir,

"With reference to my despatch of the 17th ultimo, No. 80, relative to the boundary which has been established between New South Wales and South Australia, I have now to acquaint you that in intimating to Sir Henry Young my approval of the manner in which this work has been performed, as reported in a despatch which has been received from his predecessor, I have informed him that I consider it very desirable that no time should be lost in carrying on the survey to the river Murray.

"(Signed) Grey."

The suggestion of the Colonial Secretary contained in this letter was followed by the Governors of the two States, and the continuation of the demarcation of the line was entrusted to Mr. White and completed by him up to the Murray River on December 7, 1850. It is common ground that this was marked out on the

basis of being a continuation of the portion of the boundary marked out by Mr. Wade, and that it was done at the joint desire of the Governors of the two Colonies. The arrangements were actually carried out under the management of the New South Wales Government, but this was by the express wish of the Lieutenant-Governor of South Australia.

To conclude the history of this completion of the survey their Lordships find that in February, 1850, the Governor of New South Wales makes a claim on the Colony of South Australia for the moiety of the expenses of Mr. White, amounting to 419*l.* 4*s.* 7*d.* This sum (with a slight increase in respect of a premium which made it amount to 425*l.* 10*s.* 4*d.*) was reported to Earl Grey, who was then Her Majesty's Secretary for the Colonies, and he passed it on to the Lords Commissioners to the Treasury in a letter dated October 17, 1850, to which, on November 22, 1850, he received a reply.

[The effect of these letters, which were set out in their Lordships' judgment, was that the payment of the above sum was sanctioned, the surveying being referred to as having been necessary and already sanctioned.]

The expenses thus approved of on behalf of the Treasury and the Secretary of State for the Colonies were accordingly discharged out of the revenues of South Australia. The correspondence which passed at the time between the parties interested shews that there was the same feeling as in the case of the earlier surveys that the work had been carried out with exemplary care and diligence.

From this time forward the boundary thus marked out from the coast to the Murray River was accepted and acted upon by both Colonies as the boundary between them. It would seem, however, that in the early sixties the Government of South Australia began to suspect that the Wade and White boundary lay somewhat to the west of the meridian of 141 degrees east longitude, or in other words had been fixed in a position unfavourable to that Colony in that it diminished its area. Early in 1865 the question of marking out the boundary line northward from the Murray River came forward, and it was proposed that this should be done by extending the Wade and

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White boundary line northwards. To this latter proposition South Australia declined to accede, and finally instructions were given on behalf of New South Wales to Mr. Smalley, the Government Astronomer, and by South Australia to Mr. Charles Todd, the Superintendent of Telegraphs, to determine this part of the boundary line. They completed their work by December, 1868, as is evidenced by their report of that date. Their determination of the boundary line was entirely independent of the Wade and White line, and the point at which it starts northward from the Murray River is about two miles nineteen chains east of the point where the Wade and White line strikes that river. At the date when the Smalley and Todd boundary was fixed it was possible to use the very exact method of time signalling by electric telegraphy, and there is no doubt that the later determination of the point where the 141st meridian strikes the Murray River is much more accurate than the earlier one. No one can, however, predicate even of it that it is exactly correct. It is important to notice that the acceptance of this line was, as before, treated as a matter of agreement between the two Colonies, as is evidenced by the concluding paragraph of the report above mentioned, which reads as follows: "And we hereby agree on behalf of our respective Governments to accept the line hereinbefore described as the common boundary of the two Colonies."

It is on this combined action of the two Colonies that the whole of the boundary between New South Wales and Victoria on the one hand and South Australia on the other as marked out on the ground has always rested.

There remains little further in the history of the question that is relevant to the decision of the matters in issue. In the year 1850 the large and important district of New South Wales as then constituted, known as Port Phillip, was erected into the independent Colony of Victoria. The river Murray forms the northern boundary of this Colony, and therefore Victoria alone is directly interested in the question of the validity of the Wade and White boundary. The present Colony of New South Wales has no interest in it. Acts have since been passed as to the formation of electoral districts in Victoria, and as to the

jurisdiction of public officers and magistrates. In all this legislation, as well as in the civil and criminal administration in the frontier lands, the existence of a boundary line has been recognized, and that boundary line has always been in practice the Wade and White line. But since the actual inaccuracy in the position of the Wade and White line has been a matter of general knowledge South Australia has again and again tried to induce Victoria to consent to a redetermination of the boundary. Such an attempt commenced in 1869, and at one time appeared likely to succeed, but in the year 1876 the Government of Victoria finally refused its consent and the matter fell through, and a like fate has attended subsequent attempts of the same kind on the part of South Australia. Their Lordships, however, are of opinion that entering upon such negotiations does not imply any abandonment on its part of its contention that the original settlement is binding.

In the year 1861 the Queensland Government Act, 24 & 25 Vict. c. 44, was passed, which contained in clause 5 a provision relating to all the Australian Colonies. This clause reads as follows: "Whereas the boundaries of certain of Her Majesty's Colonies on the Continent of Australia may be found to have been imperfectly or inconveniently defined, and it may be expedient, from time to time, to determine or alter such boundaries: Be it therefore enacted as follows:—

"It shall be lawful from time to time for the Governors of any contiguous Colonies on the said Continent, and with the advice of their respective Executive Councils, by any instrument under their joint hands and seals, to determine or alter the common boundary of such Colonies; and the boundary described in any such instrument shall be deemed to be, within the limits there laid down, the true boundary of the Colonies, so soon as Her Majesty's approval of such instrument shall have been proclaimed in either of such Colonies by the Governor thereof."

It was therefore competent to the Colonies of Victoria and South Australia after the passing of this Act to readjust their common boundary by observing the formalities prescribed by the Act and without any appeal to Imperial legislation, but their Lordships are of opinion that (excepting as explaining the

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later negotiations above mentioned) this Act has no relevance to any of the matters in issue in this appeal, because on the one hand it is common ground that nothing has been done which would constitute a compliance with the conditions of the section, and on the other hand their Lordships have no doubt that the passing of this Act did not take away from the Governments of the Colonies interested any rights or powers which they previously possessed. Its sole effect was to enable them, if they complied with its provisions, authoritatively to fix a common boundary line whether or no it agreed with that previously fixed by Imperial legislation or by Orders in Council. This was an additional power given by the statute which was not previously possessed by those Colonies.

Having thus recapitulated the relevant material it remains to consider the argument based thereon by the appellants. It is clearly and forcibly expressed in the dissenting judgment of Higgins J. in the High Court. It may be stated thus: The Act of 1834 (4 & 5 Will. 4, c. 95), under which South Australia was created a Colony, enacted that His Majesty, with the advice of His Privy Council, might erect within a defined part of Australia (which includes the present Colony of South Australia) one or more Provinces and fix the respective boundaries of such Provinces, and that the inhabitants of such Provinces should be free from the laws, orders, statutes, and Constitutions of other parts of Australia, but should be subject to and bound to obey such as were from time to time made for such Province or Provinces. They further say that by the Order in Council of February 19, 1836, the Crown, acting under the powers given by that Act, created the Colony of South Australia and fixed its eastern boundary at the meridian of 141 degrees east longitude; that the boundary so fixed has the same legal status as if it had been fixed in and by the Imperial statute, and that therefore nothing less than an Imperial statute can alter it. Finally, they say that no Imperial Act has been passed which either specifically alters it or gives powers of alteration to any other individual or Legislature which have been exercised in that behalf, and that therefore the boundary between the two States remains as it was fixed by the Order in Council.

Counsel for the appellants did not in any wise shrink from putting forward in the plainest terms the consequences which he contended must follow from the above legal argument. He admitted that neither at the date of the Order in Council nor at any subsequent time was it possible to fix with accuracy a line on the surface of the earth representing the meridian; he also admitted that the degree of accuracy with which this could be done had increased with the progress of knowledge and would probably increase still further in the future, and that therefore the boundary, however carefully fixed, could never be said to be the legal boundary or to warrant the claim of either Colony to exercise jurisdiction up to it in view of the possibility that a redetermination of greater accuracy might shift its position.

With much, if not all, the legal argument for the appellants stated as above their Lordships find themselves in agreement. They are of opinion that, so far as fixing the boundary of South Australia is concerned, the letters patent of February 19, 1836, have the authority and force of an Imperial statute, and that no subsequent legislation has modified them so far as is relevant to the present appeal. The interpretation and validity of the provisions of these letters patent stand to-day just as they stood at the time when they were issued. But their Lordships find themselves unable to accept the interpretation of those provisions which is contended for by the appellants.

In order to make clear the decision of their Lordships on this point and the reasons upon which it is based it will be necessary shortly to consider what is implied in taking an astronomical line such as a meridian as the boundary of a State. The position and course of such a line on the actual surface of the earth can only be obtained by means of elaborate astronomical observations. At the date of the letters patent the possible observations for this purpose were of three kinds. The first was by lunar observations, which would give by means of a comparison of the position of the moon as observed locally with the computed position of the moon as recorded in the Nautical Almanac a means of ascertaining the difference between local time and Greenwich time, and, therefore, of determining the longitude of the place. This method, though probably the most accurate then available,

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was liable to errors of observation and further to errors in the computation of the moon's future position contained in the Nautical Almanac, which, especially at so early a date, were not inconsiderable. Another method was by chronometrical observations. A considerable number of chronometers of known rate are compared with the local time at a place whose longitude is known, and then brought to some place of observation near to the position of the meridian and compared with the local time there, and in this way the difference of the local time at the place of observation and at the place selected as a basis of comparison is ascertained and the difference of their longitudes arrived at. This method was liable to a double error. The longitude of the starting point might not have been correctly ascertained and any error in such longitude must necessarily appear in the final result. But there was the further source of error arising from the difficulty of making chronometrical observations with accuracy. The third method was by direct triangulation, that is to say, by making a complete survey starting from some point of departure whose longitude was supposed to be known, and reaching to and including the place of observation near the desired meridian. This was liable to error due to inaccuracy in the determination of the longitude as a point of departure in exactly the same way and to the same extent as the preceding method. But in addition it had its own special sources of error. Although no doubt a complete and careful geodetic survey conducted with all the modern precautions against error is a very satisfactory way of determining the position of any point in a country, the cumulative effect of errors of observation in such a triangulation as waspracticably possible in a sparsely occupied country at that date would necessarily be considerable.

The critical fact for the decision of the question in this case is that, although care on the part of the observers and excellence in the instruments used by them are able to reduce the effect of these sources of error to an amount which appears to be negligible in angular measurement, the practical consequences of such an error on the face of a globe of the size of the earth are by no means capable of being neglected. A degree, which is the ninetieth part of a right angle, seems to be a very small

angle, and when it is borne in mind that a second is the three thousand six hundredth part of that small angle it would seem to be meticulous particularity to trouble about a few seconds in the determination of an angle. But in the latitude in question the distance corresponding to one second of arc (which is passed over by the sun in the fifteenth part of a second of time) is about 80 feet, so that the inevitable inaccuracy of these determinations represents considerable distances on the surface of the earth. The expert astronomical witnesses that were called in this case estimated the probable error of such a determination if made in or about the year 1847 at amounts varying from one mile to three miles, so that it may safely be assumed that at the date of the letters patent it was impracticable to determine the position of the meridian without a probable error of, say, two miles.

The fact that no astronomical determination can be accurate is not a reflection on the position of astronomy among the sciences. Throughout the whole world of observations the inevitable presence of inaccuracies is recognized, and the dominant idea is to determine the probable error of each set of observations, that is to say, the margin of inaccuracy which must be allowed to it and within which it cannot be trusted. As the means and instruments of observation improve this probable error grows smaller, but it can never disappear. A striking example of improved methods is given in the present case. The letters patent date before the introduction of electric telegraphy, and Wade and White made their determination before it was available for their purpose. The consequence is that they had to base their survey on results obtained from the comparison of chronometers, whereas far more accurate determinations of time can be made by electric signals which are instantaneous in transmission. But even with the use of such improved methods there remains a probable error, and it would appear that the determination of the boundary of New South Wales and South Australia north of the Murray River, which was made with the aid of telegraphic signals, is probably a hundred yards to the east of the meridian which it purports to mark out.

Bearing these considerations in mind, let us consider what is

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the meaning of fixing the boundaries of two provinces by an astronomical line such as the meridian. This boundary is to separate not only civil but criminal jurisdiction. The inhabitants of the country on the one side are to be subject to one set of laws and authorities, and those that inhabit the country on the other side of the line are to be subject to another. It is essential that the given boundary should be such as fixes the rights and duties of the people and their rulers, and this can only be done by its fixing a boundary on the surface of the earth which divides the two. To hold in favour of the appellants would be to say that the provisions of the letters patent contemplated the continued existence of a no man's land of finite breadth over which the authorities of neither Colony could legitimately assert authority and which, although no doubt its breadth might be reduced as the advance of science diminished the probable error of the observations, could never be wholly extinguished.

It is impossible, in their Lordships' opinion, to hold that this is the true and complete interpretation of the provisions of the letters patent taken in connection with the statute under which they were issued, which is expressly directed to the defining of a province or provinces the inhabitants of which "shall be free and shall not be subject to or bound by any laws, orders, statutes or Constitutions" of any other part of Australia, but shall be subject to and bound by their own only. To define a boundary for such purposes it is necessary that the boundary line should be described or ascertainable on the actual surface of the earth. In the case of such a boundary as that defined by the letters patent it was necessary in order to accomplish this that there should be an Executive act so defining and representing the enacted boundary; and seeing that such an Executive act was and must have been known to be essential to render the provision in the letters patent a boundary such as was needful for the purposes of the Act, their Lordships have no doubt that on well-known principles of the interpretation of statutes the letters patent must be taken to have implied and authorized the delineation and determination of the effective boundary by such an Executive act.

Counsel for the appellants would have us take the view that

it only contemplated laying out from time to time a provisional boundary differing from the legal boundary, which, though growing more and more accurate, would never possess the status of finality. But in so doing he entirely overlooked the difficulties of the case. It is impossible for authorities to settle provisionally between themselves what area of jurisdiction they will take. The rights and liberties of the inhabitants of the country are expressly settled by the statute and such a suggestion would imply that the Legislature contemplated that the authorities should without any warrant suspend as they might find most convenient its express provisions. But furthermore can it be supposed that it was the intention of the Legislature and of the King in Council that the authorities should expose themselves ex necessitate to actions by persons over whom they have exercised jurisdiction prior to some redetermination of the boundary line in places where it has been ascertained that their jurisdiction did not legally extend? The only alternative is that they should on both sides abstain from exercising jurisdiction over any part of the doubtful territory, and this would be to permit the creation of an Alsatia in which criminals would enjoy full protection. And we are asked to accept an interpretation which entails all these grave difficulties in lieu of holding that the legislation carries with it an implied power to the Executive to do such acts as are and are known to be necessary to translate the directions of the letters patent into an actual boundary in the practical sense of the word.

Their Lordships therefore hold that on the true construction of the letters patent it was contemplated that the boundary line of the 141st meridian of east longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two Colonies, and that it therefore implicitly gave to the Executives of the two Colonies power to do such acts as were necessary for permanently fixing such boundary. This being so, the only question is whether the acts of the Executive fixing the Wade and White line as the boundary were acts such as were so contemplated and empowered. As to this their Lordships feel no difficulty. The facts set out above shew that the two Governments made with all care a sincere effort to represent

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as closely as was possible the theoretical boundary assigned by the letters patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature it was to have the solemn status of a boundary of jurisdiction, their Lordships have no doubt that it was intended by the two Executives to be fixed finally as the statutable boundary and that in point of law it was so fixed. Nothing could be more striking than the open and formal way in which the Wade line to the 23rd degree of south latitude was proclaimed and acknowledged by both Colonies with the sanction of the Secretary of State for the Colonies, and though the northern part of the boundary which was laid out by Mr. White did not receive such a formal and public recognition inasmuch as it was not proclaimed, yet it was ordered, carried out, and accepted in precisely the same way as the earlier survey, and there is not in their Lordships' opinion any difference between the two portions of the boundary in respect of their authority and finality.

It is unnecessary, therefore, for their Lordships to consider that portion of the respondents' case which rests upon the length of time during which the boundary line has been in fact accepted in practice by both Colonies. Similarly they do not think it necessary to deal with the somewhat refined considerations arising from the fact that the Victorian electoral districts have been statutably mapped out on the basis of this boundary line in the statutes creating them, nor to consider whether the Royal prerogative to fix boundaries can be treated as being in abeyance so far as these Colonies are concerned. They therefore express no opinion on these points.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant: *Sutton, Ommaney & Rendall.*
Solicitors for respondent: *Freshfields.*

[HOUSE OF LORDS.]

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND . . . . . } APPELLANTS;

AND

MACLEOD AND OTHERS . . . . . RESPONDENTS.

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Scottish Law—Company — Winding-up—Bankruptcy — Preferential Claim —Obligation to assign Debenture in Security for Debt — Assignation not completed at Date of Liquidation.

A Scottish company, which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain goods of the company which the bank held in security, the company should obtain a debenture from an English company, which was indebted to it, and should assign the debenture to the bank in lieu of the surrendered security. The goods were surrendered and the debenture was obtained from the English company, but before it had been assigned to the bank the Scottish company went into liquidation. The bank claimed the debenture on the ground that the company held it for its behoof:—

Held, that the contractual obligation of the company to assign the debenture did not constitute a trust in favour of the bank and that the company was the party beneficially interested in the debenture at the date of the liquidation; and the claim of the bank rejected.

Dictum of Lord Westbury in *Fleeming* v. *Howden* (1868) L. R. 1 H. L. Sc. 372, at p. 383, considered.

Interlocutors of the Lord Ordinary and the Second Division of the Court of Session in Scotland, 1913 S. C. 255, affirmed.

APPEAL from interlocutors of the Lord Ordinary (Lord Cullen) and of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie) so far as they dealt with the claim hereinafter mentioned. (1)

Hutchison, Main & Co., a limited company, who were customers of the appellants, the Bank of Scotland, went into liquidation on July 1, 1910, and the respondents were appointed liquidators. On July 15, 1910, a supervision order was pronounced and the winding-up was remitted to Lord Cullen, Lord Ordinary. The Bank of Scotland claimed in the liquidation to be entitled to the

* *Present:* EARL OF HALSBURY, LORD KINNEAR, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) 1913 S. C. 255.

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extent of 14,000*l.* to a security constituted by a debenture for 17,000*l.* issued by Frank A. Johnson, Limited, to Hutchison, Main & Co. in pursuance of an agreement dated March 4, 1910, and made between Frank A. Johnson, Frank A. Johnson, Limited, and Hutchison, Main & Co.

The liquidators rejected the claim.

The liquidators, having adjudicated upon the claims lodged by the creditors, presented a note to the Lord Ordinary craving the Court to approve of their deliverances. The Lord Ordinary appointed intimation of the note and ordained creditors, if so advised, to lodge answers. The Bank of Scotland, being dissatisfied with the liquidators' deliverance on their claim, lodged answers accordingly. The Lord Ordinary found the averments made by the bank in support of their objections to be irrelevant and the Second Division adhered to his interlocutor.

The facts appearing from the averments of the bank and the correspondence were as follows: Hutchison, Main & Co. carried on business as golf ball manufacturers and in the course of that business made considerable sales to Frank A. Johnson, of London, who afterwards converted his business into a limited company under the style of Frank A. Johnson, Limited, which thus became indebted to Hutchison, Main & Co. in considerable sums, the course of settlement of which was largely by means of bills. In January, 1910, communications were passing between Hutchison, Main & Co. and the bank with reference to the former's financial position, which was then unsatisfactory, largely through the indebtedness of Johnson to the company and on bills discounted by the bank, and the bank began to curtail their discounting of Johnson's bills. At that time the bank held a considerable amount of goods and merchandise of the company in security of the latter's indebtedness to them. Proposals were made by the company for the closing of the existing account and for the gradual liquidation of the existing overdraft and the obtaining of further overdraft facilities on a new account to be opened, such account being secured by guarantees to the extent of 10,000*l.* These proposals were agreed to and a new account was opened secured as above mentioned. On February 2, 1910, the company, who had also financial dealings with the British Linen

Bank, proposed that the Bank of Scotland should transfer to the British Linen Bank certain produce, in the shape of gutta-percha and golf balls, then forming part of the security held by the Bank of Scotland, to the face value of 2000*l.*, and should take in lieu thereof bills on F. A. Johnson for 3000*l.* to be held in security, and that the company, by way of collateral security, should give the Bank of Scotland a debenture or floating charge over the assets of F. A. Johnson for the sum of 12,000*l.* This proposal was accepted by the bank. In pursuance of this arrangement, the bank surrendered to the company and passed on to the British Linen Bank part of the produce held by them as security to the value of 2000*l.*, and on February 3, 1910, Messrs. W. Baird & Co., the law agents of the company, wrote to the bank: "We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr. Johnson a debenture or floating charge over the whole of his assets in the name of the company for the amount required to secure the debt due by Mr. Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood, in respect of the arrangements made, that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence." This letter was acknowledged by a letter dated February 4, 1910, from Mr. Bisset, the bank manager in Glasgow, to Messrs. Baird & Co. in which he said: "With regard to the debenture or floating charge over Mr. Johnson's assets, we shall rely on your having this completed as soon as possible and sent to us for assignation to the bank as a security for the company's indebtedness." Thereafter the company, in further pursuance of the arrangement, left with the bank bills accepted by Johnson for sums amounting to 3826*l.* odd. On March 4, 1910, an agreement was entered into between Johnson, Frank A. Johnson, Limited, and Hutchison, Main & Co. Under clause 5 thereof Frank A. Johnson, Limited, undertook forthwith to execute and deliver to Hutchison, Main & Co. a debenture or series of debentures for a total sum of 1700*l.* to be held by the latter

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company as security for all the amounts which might from time to time be owing to them in respect of the bills accepted by F. A. Johnson set forth in the schedule to the agreement, or of any other sum that might be due to the company either in respect of advances or generally on trade account, together with all legal costs and expenses in Glasgow and London already incurred or to be incurred by the company in connection with the matter, not exceeding in the whole the sum of 17,000*l.* for principal moneys. The debenture for 17,000*l.* was duly executed and delivered to the company.

After the execution of the agreement of March 4, 1910, a draft agreement was prepared by the English solicitors of Hutchison, Main & Co. to be entered into between the company and the bank to give effect to the arrangements come to between them, under which the bank were to receive the benefit of the debenture to the extent of 14,000*l.*, but this agreement had not been executed when the company went into liquidation.

The bank maintained that they were entitled to the benefit of the debenture to the extent of 14,000*l.* as part of their security, in respect that, as part of the arrangements concluded between the company and the bank, the company were under obligation to transfer the benefit of the debenture to the extent aforesaid, and that such obligation was therefore binding on the liquidators. They also averred that they carried out their part of the arrangements, gave the further financial facilities agreed on, and surrendered produce to the extent of 2000*l.* held in security on the faith of that obligation.

1913. Nov. 17, 19. *T. B. Morison, K.C.* (Solicitor-General for Scotland), and *Clyde, K.C.* (of the Scottish Bar), for the appellants. The question is whether the appellants are entitled to the extent of 12,000*l.* to a security held by Hutchison, Main & Co. in their own name at the date of the sequestration. The appellants rely on the law of tantum et tale, to which effect was given in this House in *Heritable Reversionary Co.* v. *Millar.* (1) The judgments of the Second Division proceeded upon a misreading of the correspondence. They read the letters of February 3 and 4 as

(1) [1892] A. C. 598; 19 R. (H. L.) 43.

imposing a suspensive condition, namely, that the obligation of the company should have no binding effect until a formal deed was signed. But the appellants' averments shew that on February 2 a net and clean arrangement was come to and that that was confirmed by the letter of February 3. The appellants' case is that the absolute legal title of the company is effectively subjected to an equitable obligation in favour of the appellants. The appellants are made the attorney of the company for enforcing the agreement. The company in fact held the security under a personal contract with the appellants the effect of which was to make the former accountable to the latter for the security to the extent of 12,000*l.* just as much as if the company had in terms undertaken as trustee or agent. The company would have no answer to the claim of the appellants to act as their attorney to enforce the security. It would have been a fraud on their part to have used the property so as to prejudice the appellants' interest therein. By the arrangement come to between the parties the company undertook to make the debenture available to the appellants, that is, precisely, to hold it in trust for them. Therefore the moment the company got the debenture there arose a resulting trust. The law of tantum et tale is not limited to cases of latent declaration of trust, but applies wherever there is a personal contract which results in imposing upon the ex facie owner a legal obligation to account for the subject to somebody else, upon the principle stated by Lord Westbury in *Fleeming* v. *Howden*. (1) The ex facie owner is thereby placed in a fiduciary relationship in regard to the property, and his trustee in bankruptcy stands in no better position. The doctrine of *Millar's Case* (2) is not limited to the particular facts of that case, but applies wherever the effect of the personal obligation is to establish a fiduciary relationship between the parties, and for this purpose there is no difference between an ordinary trust and security or agency: *Union Bank of Scotland* v. *National Bank of Scotland* (3); *Forbes's Trustees* v. *Macleod* (4); *Dunn* v. *Pratt* (5); *Gordon* v.

(1) L. R. 1 H. L. Sc. 372, at p. 383; 6 Macph. (H. L.) 113, at p. 121.

(2) [1892] A. C. 598; 19 R. (H. L.) 43.

(3) (1886) 12 App. Cas. 53; 14 R. (H. L.) 1.

(4) (1898) 25 R. 1012.

(5) (1898) 25 R. 461.

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Cheyne (1); *Dingwall* v. *McCombie* (2); *Littlejohn* v. *Black* (3); *Macadam* v. *Martin's Trustee.* (4) The appellants are therefore entitled to proof.

R. S. Horne, K.C., and *A. C. Black* (with them *F. D. Morton*) (the two former of the Scottish Bar), for the respondents. By the law of Scotland an incorporeal right can only be transferred by assignation, and it is not effectually transferred unless the assignation is intimated to the debtor. It is said that that is altered here because there is a condition under which Hutchison, Main & Co. had become trustees of this security for the appellants. But it is impossible to spell out of the averments or the correspondence anything in the nature of a trust or mandate. The letter of February 3 is indefinite as to amount and time and it contemplates that a transfer shall be made in legal form. There never was any binding contract for any particular sum at all. The 12,000*l.* was fixed by reference to Johnson's indebtedness to Hutchison, Main & Co. and the amount varied with and depended upon the amount of that indebtedness. The beneficial interest in this debenture was in the company until it was transferred out of their hands. It was something which they were procuring for their own benefit in the course of their relations with Johnson. All the cases cited by the appellants are distinguishable on that ground. Where, as here, the beneficial interest in the property is in the person who has the formal title and there is no effective transfer of the property before his bankruptcy there is no case which says that that property does not pass to his trustee. [They referred to *Stiven* v. *Scott* (5) and *Gourlay* v. *Mackie.* (6)]

Clyde, K.C., replied.

Earl of Halsbury. We are all agreed that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs, but it will be convenient that the reasons for our judgment should be given at a later date.

1914. Feb. 6. Lord Kinnear. My Lords, the question in this case is raised by a claim made by the appellants in the liquidation

(1) (1824) 2 Sh. (1834 ed.) 566.
(2) (1822) 1 Sh. (1834 ed.) 431
(3) (1855) 18 D. 207.
(4) (1872) 11 Macph. 33.
(5) (1871) 9 Macph. 923.
(6) (1887) 14 R. 403.

of a limited company, called Hutchison, Main & Co. The claim is based on an alleged preferable right in a certain security which is said to have been constituted by a debenture created and issued in favour of Hutchison, Main & Co. by another limited company styled Frank A. Johnson, Limited. This debenture is now in the hands of the liquidators, and would seem prima facie to be held by them as an asset of the estate for distribution among the creditors pari passu. But the appellants claim right to a preference which will exclude the other creditors on two different and inconsistent but alternative grounds. They say, first, that at the date of the liquidation they had obtained a valid and effectual security over this debenture for payment of a debt of 14,000*l.* due to them by the company; and, secondly, that the debenture is not part of the distributable estate, but belongs to them, inasmuch as at the date of the liquidation it was held by the company as trustees for them, and not as beneficial owners. Both grounds have been rejected as untenable by the Court below, and I think the judgment is right.

It is common ground between the parties that the rights of competing creditors in the liquidation are to be governed by the same rules as regulate the rights of creditors in a sequestrated estate under the Bankruptcy Acts. These are well established and familiar. The general object of the statutes, as Lord President McNeill states it in *Littlejohn* v. *Black* (1), "was to preserve as far as possible all rights and interests in the position in which they stood the moment before bankruptcy." From that moment no preference could be acquired by any creditor, or created by the bankrupt. But the earlier Act, with which he was at the time concerned, as well as that now in force "abstained from disturbing any securities or preferences honestly obtained and lawfully completed according to the nature of such securities or preferences." I do not understand it to be disputed that in this respect the company in liquidation is exactly in the same position as an individual debtor under the Bankruptcy Acts. Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company

(1) 18 D. 207, at p. 215.

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and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act that the estate is to be distributed among the creditors pari passu. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands, by virtue of an effectual legal right. The question, therefore, is whether, at the date of the liquidation, the appellants had obtained a valid security legally completed over the debenture issued by F. A. Johnson.

In answering this question the Court did not require to consider whether a floating charge over the assets of a trading company would constitute a valid security according to the law of Scotland except in the cases where it may have been specially authorized by statute, because Frank A. Johnson is an English company, and its rights and liabilities must be governed by English law. Nor did they need to inquire, as in other circumstances might have been necessary, how far it was valid and effectual, or by what method it could be effectually transferred in security, according to the law of England, because, in fact, it has not been transferred to the appellants at all.

There can be no question that by the law of Scotland the jus crediti in debts may be made the subject of an effectual security, provided the debt be assigned and the assignation completed according to the method recognized as proper for the completion of such rights. But to make it effectual the assignee must have a right which he can enforce against the debtor in his own name, because it is indispensable for the efficacy of a security that the secured creditor should have jus in re. It is manifest on the face of their own statement, and of the document they produce in support of it, that the appellants have no such right. They say that the company had financial dealings both with the appellants themselves and with the British Linen Bank, and that, at a time when the appellants were not satisfied with the state of the account, it was arranged that they should transfer to the British Linen Bank certain goods which they held in security, and in lieu thereof should take bills on F. A.

Johnson to be held in security, and "as collateral security the company would give the appellants a debenture or floating charge over the assets of F. A. Johnson for the sum of 12,000*l*." This last part of the statement lacks precision. But the nature of the proposed debenture is more clearly brought out in the contractual obligation.

This is expressed in a letter from the company's agents to the appellants, dated February 3, 1910, in the following terms: "We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr. Johnson a debenture or floating charge over the whole of his assets in the name of the company for the amount required to secure the debt due by Mr. Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank." This is the only writing by way of security which the appellants ever obtained, and it seems to me quite idle to pretend that it is a valid and effectual security in itself. It is a promise to give the bank the benefit of a security which the company is to procure from its debtor in its own favour, and it is nothing more. It does not appear in what manner the bank was to obtain this benefit, and in particular it is not stated whether the debenture is to be transferred or whether the company is to account for the proceeds. But this is not material, because nothing was done to make the promise effectual. The appellants' counsel laid great stress on the undertaking to "make the debenture available to the bank" as soon as it reached the hands of the agents. But that only shews that something remained to be done which the appellants could not do for themselves. If they have a complete and real security they require no help from the company to make it good. If they have not, they have no preference of any kind. They are in no better position than that of unsecured creditors of the company, and the estate must be divided equally among all such creditors.

But then it is said that the question as to the validity of the security arises only on the assumption that the debenture is

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part of the distributable estate, and that, although the appellants have stated a claim on that assumption, their substantial case is that it is held by the company and its liquidators, not as part of the company's estate, but as trustees for them. In aid of this contention it was argued that the company procured the debenture as agents for the appellants. But agency is matter of fact, and no facts are proved or stated from which it could possibly be inferred. The case has been decided on the assumption that the appellants' averments on record are true, and in these averments no suggestion is to be found that they employed Hutchison, Main & Co. as their agents to procure the debenture. In the absence of averments relevant to be sent to proof, the case must be decided on the documents. These consist of the letter already mentioned, the agreement between Hutchison, Main & Co. and Frank A. Johnson, and the debenture itself, and there is no trace of the supposed agency in any of them. If they are to be taken as expressing the transaction, they make it apparent that Hutchison, Main & Co. procured the debenture in their own name and acting on their own behalf, and not as agents for anybody else. The agreement between them and Frank A. Johnson was that the latter should execute and deliver to the Scotch company a debenture for a total sum of 17,000*l.* to be "held as security for all amounts which may from time to time be owing to the Scotch company"; and the debenture actually issued is, accordingly, for 17,000*l.*, and is in favour of Hutchison, Main & Co. I have no difficulty, therefore, in rejecting the argument founded on a supposed agency. But it is nevertheless true that Hutchison, Main & Co. were under an obligation to make the debenture available to the appellants, not to its full amount, but to the extent of 12,000*l.*, and it is said that this affects their right with a trust which excludes any beneficial interest in themselves or their creditors. The argument was founded on the decision of this House in *Heritable Reversionary Co.* v. *Millar* (1), and on the doctrine which was there considered that a trustee in bankruptcy takes the estate tantum et tale as it stood in the bankrupt.

But the decision has only a remote bearing, if any, on the

(1) [1892] A. C. 598; 19 R. (H. L.) 43.

case before your Lordships, and the doctrine of tantum et tale is inapposite, because on the liquidation of a limited company there is no transference of property to which it can be applied. The effect of the Bankruptcy Act is to divest the bankrupt, and to invest the trustee in the entire estate; and it is not surprising that questions should have arisen as to the extent to which this transference of the legal title might or might not involve a corresponding transference of all equitable qualifications which might have affected the estate in the hands of the bankrupt. But the liquidators of a limited company are not vested in the estate to the exclusion of the company. The estate remains vested in the company itself, and the liquidators are mere administrators of it for the purpose prescribed by the statute, and that is for equal distribution among creditors. It appears to me, therefore, that the argument on the doctrine of tantum et tale is beside the mark. But the question remains whether the debenture forms part of the distributable estate; and it is that which is said to be decided by the case of *Millar*. (1) I cannot agree. The only arguable question in that case belonged to a totally different chapter of law: to wit, what is the legal effect of the registration of an absolute title to land in the Register of Sasines. A bankrupt who had been manager of a trading company had purchased a certain heritable property for behoof of the company and on the instructions of their directors, and the purchase-money was provided by them. He took the title in his own name, and he executed a declaration of trust which was perfectly explicit, and effectual to qualify his right; but unfortunately he recorded the title, ex facie absolute, in the Register of Sasines, and he did not record the declaration of trust. It was, therefore, a latent trust, however effectual as between the agent himself and his employers. It was held in the Court of Session (2) that the Register of Sasines was conclusive because the bankrupt was infeft on an absolute title, and every one, whether creditor or purchaser, dealing with a proprietor infeft was entitled to rely on the public records, and was not affected by any qualification or burden on the real right which did not appear there. The main ground of judgment was

(1) [1892] A. C. 598; 19 R. (H. L.) 43. (2) (1891) 18 R. 1166.

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that the bankrupt could have sold the subject and given an unimpeachable title to a purchaser, and that the trustee in bankruptcy is vested in all heritable estate held by the bankrupt under such an absolute title, to the same effect as if he had obtained a decree of adjudication, in implement of a sale to himself.

That construction of the vesting clause was corrected in this House and the judgment was reversed on the ground that as between the bankrupt and his employers the former was a bare trustee, and the latter were the true and beneficial owners of the property, which, therefore, did not belong to the bankrupt in the sense of the Act, and was not vested in the trustee. It was not disputed that third persons dealing with the bankrupt with specific reference to the property were entitled to rely on the title as it stood on the Register of Sasines, and thus, that an onerous purchaser from him would have obtained an unimpeachable title. But it was held that this would not be because the property was his, but because the true owners had permitted him to appear on the Register of Sasines as the owner, and thus entitled any one dealing with him for value to regard him as such. The noble and learned Lords held that the rule of personal bar which thus protects transactions of the trustee from challenge only applies to such as have specific reference to the trust estate, and is not pleadable by personal creditors who do not stipulate for, or obtain, any conveyance to that estate. This appears to me to be the full force of the decision; and I am unable to see that it has any bearing on the matter in hand. Of course it assumes, what, indeed, was never disputed, that property admittedly held under a bare trust, without any beneficial interest in the trustee, would not pass to his creditors on his bankruptcy. But the bankrupt's title of property was qualified only by a latent trust. The question was whether this latent declaration of trust could be looked at; and when that was once settled by the decision of this House the rest followed as a matter of course.

It is further to be observed that the trust so established was declared in express terms, and directly affected the constitution of the real right. It is a very different thing to say that a

personal obligation to give the benefit of a specific fund to a particular creditor creates a trust which attaches to the fund and excludes it from the estate for distribution. That the judgment in the case of *Millar* (1) was not intended to cover such a case as this is obvious, because Lord Herschell states the distinction between the duty imposed by a trust and the liability created by a personal contract in perfectly clear terms. But the appellants rely upon a dictum of Lord Westbury in *Fleeming* v. *Howden* (2), where he is reported to have said that "an obligation to do an act with respect to property creates a trust." This proposition is expressed in general terms, but in relation to property only, and not to personal obligations; and it must be interpreted with reference to the particular case which the noble and learned Lord was discussing. The effect intended to be given to it in that case does not seem to me to be doubtful. Mr. Fleeming, afterwards Lord Elphinstone, held the estate of Duntiblae under a deed of entail which required him to denude on succeeding to a peerage. He was duly infeft in terms of an instrument of sasine which was recorded in the Register of Sasines, but the deed under which he held was not recorded in the Register of Tailzies. It followed that, although the entail was distinctly set forth on the face of the deed in which he was infeft, the fetters of the entail were ineffectual to exclude the diligence of creditors. He succeeded to a peerage in 1860 and died in 1861 without having denuded, and leaving large debts. It was held that the estate did not pass to a trustee in bankruptcy because from the moment the clause of devolution became operative it was not to be regarded as the property of the deceased bankrupt but was held by him in trust for the benefit of the heir to whom it had devolved. But it was so held, as is shortly but very clearly explained in the judgment of Lord Colonsay, because the duty to devolve was a quality of the right on the face of the title under which Mr. Fleeming possessed. It was thus a trust which every one becoming his creditor on the faith of his having a feudal investiture was bound to know, for there it stood open and patent. An obligation of

(1) [1892] A. C. 598; 19 R. (H. L.) 43.

(2) L. R. 1 H. L. Sc. 372, at p. 383; 6 Macph. (H. L.) 113, at p. 121.

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this kind, which in express terms qualified the title to land, imposed a duty which might well be held to involve a trust.

But to extend Lord Westbury's phrase so as to make it cover personal obligations which do not affect the real right of the obligor seems to me altogether extravagant. It was maintained in argument that every obligation with reference to any property or fund which involves a liability to account fell within the principle. If that were so every imperfect security, however invalid as a real right, would be effectual as a trust. But then in the same sense a bankrupt holds his whole estate as trustee for all his creditors. The fallacy consists in using legal terms in a popular or metaphorical sense and yet affixing to them all the legal consequences which would attach to their use in a strictly technical sense. It is impossible to suppose that Lord Westbury employed the word "trust" in any such inaccurate sense, and, indeed, the danger of so using it is nowhere more clearly exposed than it is by that eminent person himself in *Knox* v. *Gye*. (1) In discussing the liabilities of a surviving partner to the representatives of a deceased partner, his Lordship says, "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately." He is not a trustee: if he is by an improper use of words to be called so the trust is limited to the discharge of his obligation. He goes on to say, "It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee holding the property exclusively for the benefit of the cestui que trust—well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." That Mr. Fleeming was a complete trustee in the sense thus explained, holding the property as trustee by express declaration, and holding it exclusively for the benefit of the cestui que trust, is beyond

(1) (1872) L. R. 5 H. L. 656, at p. 675.

question, because it was so decided by this House. I think it equally clear that Hutchison, Main & Co., who held a debenture under no express declaration of trust, and who certainly did not hold it exclusively for the benefit of the appellants, cannot be styled trustees of that debenture except by such an inaccurate use of language as Lord Westbury condemns. They were under an obligation to give the benefit of it to the appellants, but only to a limited extent; and that obligation they are disabled from performing in terms, because their hands are tied by the liquidation.

On the whole matter, therefore, I am of opinion that the appellants are in the position of mere personal creditors who hold no complete security for their debt, and that the debenture which they might have obtained in security had their contract been carried out is not held exclusively in trust for them, but forms a part of the estate for equal distribution among the creditors of the company.

Lord Atkinson. My Lords, this is an appeal against an interlocutor dated November 29, 1912, of the Lords of the Second Division of the Court of Session in Scotland, whereby they adhered to an interlocutor of the Lord Ordinary dated June 20, 1912.

By this latter interlocutor the deliverance of the liquidators of a certain limited liability company named Hutchison, Main & Co., on the claim of the Governor and Company of the Bank of Scotland that they were entitled, to the extent of 14,000*l.*, to a security constituted by a certain debenture in the total nominal amount of 17,000*l.* on the entire assets of a certain English limited company, styled Frank A. Johnson, Limited, in accordance with the provisions of an agreement dated March 4, 1910, made between Frank Alexander Johnson, of the first part; Frank A. Johnson, Limited, of the second part; and Hutchison, Main & Co., of the third part, was upheld.

The liquidators by their deliverance rejected this claim. The Bank of Scotland filed objections to this deliverance, and the Lord Ordinary found that the averments made by the bank in support of this objection were irrelevant. It is admitted that

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for the purpose of this appeal the averments in the answers of the bank must be taken to be true.

The facts have been fully and clearly stated in the judgment of the Lord Ordinary. It is unnecessary to re-state any but the very few upon which, in my view, the question for decision turns. Hutchison, Main & Co. were a Scotch company carrying on in Glasgow the business of manufacturers of golf balls and other gutta-percha and indiarubber goods. These goods they were in the habit of selling to Frank Alexander Johnson, and afterwards to Frank A. Johnson, Limited, the company into which Frank Alexander Johnson converted his business. As against these purchases the former company drew bills on Johnson, and subsequently on his firm, which they respectively accepted. Many of these bills were discounted by Hutchison, Main & Co. in the Bank of Scotland, and many others in the British Linen Bank; all or nearly all of each lot being renewed from time to time. Some other bills remained in the hands of the drawers undiscounted. In February, 1910, Hutchison, Main & Co. stood indebted to both banks in respect of these bills to considerable amounts. The precise amounts are immaterial. Securities had been lodged with both banks by them to secure their indebtedness. The British Linen Bank, thinking the security inadequate, refused or threatened to refuse to discount any more of these bills, or to renew any of them, unless they were further secured.

Thereupon an arrangement was entered into between the Bank of Scotland through their local manager, Mr. Bisset, whereby it was agreed that securities to the value of 2000*l.* held by the bank as against the overdraft of Hutchison, Main & Co. should be released and transferred to the British Linen Bank, who in consideration therefor would continue to renew Johnson's bills. A further term was added, of which the written evidence is contained in a letter dated February 3, 1910, written by W. Baird & Co., the solicitors of Hutchison, Main & Co., to Mr. Bisset. The passage of this letter dealing with the matter runs thus: "We further write to say that we are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr. Johnson a debenture or floating charge over

the whole of his assets in the name of this company for the amount required to secure the debt due by Mr. Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood, in respect of the arrangements made, that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence."

It would appear to me to be perfectly clear on the construction of this letter, if it embodies the agreement of the parties, that Hutchison, Main & Co., in procuring this debenture, were acting on their own behalf, and not as agents for the Bank of Scotland. I do not think there is any ground whatever for the contention that they were instructed to act as such agents, or did, in fact, so act. And it is, I think, equally clear that the only obligation they put themselves under was, at the most, a contractual obligation to make the debenture available to the Bank of Scotland "as a further and additional security" when they procured it. How that was to be done is not stated, but from the letter of Mr. Bisset to W. Baird & Co. of the following day it is plain that the mode in which he contemplated that Hutchison, Main & Co. should discharge this obligation, and make the debenture available as a security, was, by assignation of it, followed presumably by notice to the debtor, Frank A. Johnson, Limited. He wrote: "With regard to the debenture or floating charge over Mr. Johnson's assets, we shall rely on your having this completed as soon as possible, and sent to us for assignation to the bank as a security for the company's indebtedness."

This was not done. Discussion arose as to the best mode of making the debenture available, but nothing was done to perfect the security. The debenture was delivered on March 4, 1910, by Frank A. Johnson, Limited, to Hutchison, Main & Co. in pursuance of an agreement of the same date entered into between them. By that agreement Frank A. Johnson, Limited, contracted to execute forthwith and deliver to Hutchison, Main & Co. a debenture or series of debentures in the form to the agreement annexed in the total sum of 17,000*l.*, to be held by

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the latter company as security for such sums as might, from time to time, be due to them by the former company, either on the bills in the schedule mentioned, or "in respect of advances or generally on trade account." There is no mention whatever in this agreement of the arrangement made between Hutchison, Main & Co. and the Bank of Scotland touching the debenture or debentures to be delivered under it.

Hutchison, Main & Co. went into liquidation on July 1, 1913. At that time they were ex facie the absolute beneficial owners of this debenture, and according to the case of *Heritable Reversionary Co.* v. *Millar* (1) any beneficial property they had in it would, under the Bankruptcy (Scotland) Act, 1856, on liquidation pass to, and become vested in, the liquidators.

The interest which would so pass would be the absolute and entire beneficial interest (unless some lesser beneficial interest had been carved out of this whole, and had, before liquidation, become vested in another). It would not, I think, on the authorities, be at all sufficient that Hutchison, Main & Co. should have merely entered into a contract to carve out of their property in the debenture this partial interest. Something in addition should be done which would, in contemplation of equity and good conscience at all events, separate the part from the whole, and prevent that part from being available to satisfy pro tanto the creditors of the insolvent owner. The ingenious arguments of Mr. Clyde and the Solicitor-General for Scotland appear to me to amount to a contention that in the circumstances of this case this carving out took place, in contemplation of equity, the moment the debenture was delivered to Hutchison, Main & Co. They did not contend that any specific charge on the debenture was thereby created, but they did contend that, by reason of the contractual obligation of Hutchison, Main & Co. to make the debenture available as a security to the Bank of Scotland, a trust in favour of that bank attached upon it immediately upon its delivery; that Hutchison, Main & Co. thenceforth held it, as to 12,000*l.* portion of the sum secured, as trustees for the bank, and not as beneficial owners, and that the liquidators are now bound, as it is contended this company would

(1) [1892] A. C. 598.

itself have been bound before liquidation, to transfer to the Bank of Scotland the benefit of the debenture up to that sum. That contention is, in my opinion, ingenious but unsound.

I do not think that the averments contained in the appellants' answers carry their case any further than the documents. The contract they rely upon was no doubt a contract for good consideration. Whether after a delay of so many months it was enforceable, and if so, what was the nature of the relief which would be obtained, are matters beside the real question for decision, which is this: Were Hutchison, Main & Co. at the time of their sequestration owners of the entire beneficial interest in this debenture or not? In my opinion they were such owners. Whether or not they had bound themselves by contract to denude themselves of a portion of their interest does not alter their position as owners while and as long as that contract remained to be carried out. The Lord Justice-Clerk has, I think, put the case in a nutshell in the following passage of his judgment: "To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the company, and that the bank had no right to it, but had only a right to enforce a contract by which it was bound to assign the debenture to the bank." In my opinion, nothing has been shewn, either in the documents given in evidence, or in the averments contained in the appellants' answers, to establish, on any principle of equity, that at the time of the liquidation this insolvent company had, either in the form of a charge, or of a trust, denuded itself of any portion of the entire beneficial interest in the debenture. If so, the entire of that interest must go to satisfy pro tanto the debts of all their creditors, not the debt of one alone.

The decision appealed from was therefore, in my opinion, perfectly right, and this appeal should be dismissed with costs.

Lord Halsbury has requested me to say that he concurs in the judgment which has just been delivered by my noble and learned friend Lord Kinnear.

Lord Shaw of Dunfermline. My Lords, I concur. The facts are important, but they are not complex. They are as follows: In the beginning of the year 1910 a limited firm named

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Hutchison, Main & Co., carrying on business in Scotland, were indebted to two Scottish banks—one, the appellants, the Bank of Scotland, and the other, the British Linen Bank. For some time the English agent of Hutchison, Main & Co. had been a Mr. F. A. Johnson. By an arrangement amongst all these parties the Bank of Scotland transferred to the British Linen Bank certain goods and merchandise of the value of about 2000*l.* which they held in security. On the other hand, they received bills by Johnson for 3000*l.*

Johnson, who was, as stated, Hutchison, Main & Co.'s agent in England, was also indebted to that company. He was anxious to form his own business into a limited liability concern and to obtain for this concern the agency of Hutchison, Main & Co. which he himself held. It was necessary in these circumstances that some arrangement should be made by which Johnson, Limited, should come under obligation to pay the bills due by Johnson himself. This was accordingly done, and the terms of that arrangement are contained in an agreement of March 4, 1910.

By the fifth article of that agreement Johnson, Limited, undertook to execute and deliver to Hutchison, Main & Co. debentures for 17,000*l.* The terms under which the debenture was to be held were these: "Such debentures shall be held by the Scotch company (that is, Hutchison, Main & Co.) as security for all amounts which may from time to time be owing to the Scotch company either in respect of such bills set forth in the schedule hereto or of any other sum that may from time to time be due to the Scotch company by the English company either in respect of advances or generally on trade account." It thus appears, my Lords, that if there was any trust with regard to the debenture or debentures granted by Johnson, Limited, in favour of Hutchison, Main & Co., the trust was as now stated. And there can be no doubt that if Johnson, Limited, had paid the sums due by them to Hutchison, Main & Co., that firm would have been bound to hand back the debenture which had come into their hands under that simple arrangement. This transaction took place, as mentioned, on March 4.

The debenture was granted on the same day. It is by Johnson,

Limited, and it covenants with Hutchison, Main & Co., "its successors and assigns, to pay to the said Hutchison, Main & Company, Limited, its successors and assigns, on the 4th day of March, 1915, or on such earlier date as the principal moneys hereby secured shall become payable under the conditions of this debenture, at the registered office of the company, the sum of 17,000*l.* on presentation of this debenture."

My Lords, in these circumstances it would require competent and very cogent and clear evidence to convince the mind that this debenture, once granted, was not the property of Messrs. Hutchison, Main & Co. until that firm should have parted with it by voluntary assignation or until its liquidator or its trustee in bankruptcy should have succeeded to it as a consequence of the statutory assignment which vested in him everything which was in bonis of the firm.

The whole question in this case, my Lords, appears, therefore, to be : Has there been any deed produced, formal or informal, or is there indeed any relevant averment that the property in this debenture thus duly vested in Hutchison, Main & Co. was not in reality the property of that firm, but was so only in appearance,—that the debenture was only their apparent title, but that the real title to its contents was in somebody else, namely, the appellants ? In short, I will venture to put the proposition which, as it appears to me, is at the bottom of this case in these words : What proof is tendered that the contents of this debenture were not at the date of liquidation in bonis of its holder, Hutchison, Main & Co., but were in bonis of the Bank of Scotland ? For, my Lords, unless the latter proposition be relevantly averred and legally proved, the claim of the bank to that debenture must fail.

This being the statement of the proposition, it is now important to see how the bank addresses itself to it on the record. In particular, does the bank really claim that this property throughout belonged to it and not to Hutchison, Main & Co. ?

It founds upon the correspondence. From that it appears that in the preceding month of February Messrs. Hutchison, Main & Co., whose own affairs were manifestly embarrassed,

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did make an important promise to the bank. It is in these terms: "We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr. Johnson a debenture or floating charge over the whole of his assets in the name of this company for the amount required to secure the debt due by Mr. Johnson to our clients." (The letter is written by Messrs. Hutchison, Main & Co.'s solicitors, and it proceeds as follows:) "So soon as that debenture reaches our hands, we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood, in respect of the arrangements made, that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence." The bank is, therefore, undoubtedly right in so far as it maintains that a just expectation was held out to it that the debenture was to be made available to it by Hutchison, Main & Co.

The form, however, of making it available was certainly not that they should take the debenture as trustee or agent for the bank and hold the debenture for it. On the contrary, the firm took the debenture exactly in terms of the agreement made with Johnson, Limited, namely, as its own; and the arrangement with the bank was that after this had been done then the next step would be taken, namely, to grant a title to it to the bank by way of assignation. This is clear from the bank manager's letter of February 4, which says: "With regard to the debenture or floating charge over Mr. Johnson's assets, we shall rely on your having this completed as soon as possible and sent to us for assignation to the bank as a security for the company's indebtedness."

The debenture was thereafter granted on March 4, but no assignation was made. Correspondence is produced which shews that in April a solicitor in London had been consulted on the point of assignment and that counsel had been instructed to prepare a mortgage. On April 6, the bank manager stated that he would "be glad to receive the mortgage referred to when it is ready for delivery." Nothing further was done; the months slipped away; and neither assignment nor mortgage had been

received by the bank when, on July 1, 1910, Hutchison, Main & Co. went into liquidation.

My Lords, the learned judges in the Courts below, not unnaturally, treat the case as one of an "uncompleted security." And so treated their judgment upon it would humbly appear to me to be correct. But, in truth, this puts the facts too favourably for the appellants, unless indeed the words "uncompleted security" are meant to include the case of a security not merely inchoate but never to any extent having any existence. A promise had been made to bring it into existence, by way first of assignation and then of mortgage, but beyond the giving of that promise nothing had been done. The learned Lord Justice-Clerk expresses most clearly and concisely, if I may say so, the essential facts of this case in one sentence when he says: "To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the company and that the bank had no right to it, but had only a right to enforce a contract by which it was bound to assign the debenture to the bank."

It is from this point of view that the citation of much of the authority quoted seemed to me to be inapplicable. For, my Lords, the right of the bank in the circumstances which I have mentioned was a right resting upon nothing more than this, namely, an unfulfilled promise. And, when one analyses the idea, that is the simple category under which we may presume that 99 per cent. of every bankrupt's obligations could be ranged. All his creditors, down to the humblest tradesmen, relied on his promise, expressed or implied, that he would pay for accommodation given, services rendered or goods received. Upon what principle is one of these creditors to be preferred to another? The whole law of equitable distribution would be destroyed and the whole security for mercantile dealings would be much impaired if it were open to an individual creditor to say: "I got no assignment of my debtor's goods either by delivery or by deed, but he promised to me that he would not part with certain of them except in my favour." After bankruptcy or liquidation, things still standing on that footing, all these nuda pacta disappear, and the one question which remains is: Was the property—whatever

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promises were made with regard to it before—was the property at the time of bankruptcy or liquidation in bonis of the debtor or not?

It is only fair to the appellants to say that the shape of their pleadings in this case is in accord with the correspondence, their eleventh answer containing the gist of their claim at law in these terms: "As part of the arrangements aforesaid concluded between the company and the respondents (the bank), the company were under obligation to transfer the benefit of such debenture to the extent aforesaid, and that such obligation is therefore binding on the liquidators." This, my Lords, is a plain admission that at the date of liquidation the debenture was not the property of the bank, but still remained the property of the company. At the conclusion of a strenuous argument for the appellants, I ventured to put the bank's contention in the following propositions, to the accuracy of which their learned counsel assented: "When the debtor acquires and holds property in his own name, but under a personal obligation to account to a particular creditor therefor, then, in the event of bankruptcy, the existence of the personal obligation prevents the property being treated as in bonis of the debtor. On the contrary, the debtor must denude in favour of the particular creditor for whom he is truly a trustee." My Lords, I am of opinion for the reasons stated that these propositions are not in accordance with the law of Scotland. A preference created in this manner is repugnant to the sound and familiar principles of equitable distribution; and the doctrine of converting a promise to assign or transfer into something which effects a transmutation of real ownership by the debtor into merely apparent ownership by him is legally indefensible.

The only support to be obtained for this operation is by misapplying the well-known doctrine of apparent and real ownership. When an agent obtains money for the specific purpose of purchasing a property for his client and takes the title in his own name, and becomes bankrupt, it is clear that in such a case the law will get behind the apparent title to the beneficial and the real title, and that—always granted that the interests of third parties who have bought upon the faith of the records have not arisen—the property will, in the event of bankruptcy, be

correctly treated as never having been in bonis of the debtor, but always of the client. Lord M Laren explains this with clearness in *Forbes's Trustees* v. *Macleod.* (1) Or when a property is acquired by a company with the company's money and put for convenience' sake in the name of the company's manager, then upon the occasion of the manager's bankruptcy the same result happens. The apparent title and the beneficial and real title are in conflict, not on account of the existence of any promise on the part of the manager to transfer it to the company, but on account of the fact that the property all along never was the manager's but was the company's. It would be, therefore, contrary to the truth of the case to permit that property to enter the assets of the manager, to whom it never in truth belonged. The company stands accordingly preferred to the property in the distribution of his assets.

Heritable Reversionary Co. v. *Millar* (2) is the outstanding instance of this. In the language of Lord Watson, "An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title. That which, in legal as well as in conventional language, is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud." And the distinction between a case of real and beneficial interest as against apparent title on the one hand, and a case of real and beneficial interest or dominium with a contractual obligation to convey or transfer, is well brought out in the judgment of Lord Herschell, where he distinguishes the case of *Wylie* v. *Duncan* (3) in this way (4): "It appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare

(1) 25 R. 1012, at p. 1015.
(2) [1892] A. C. 598, at p. 614; 19 R. (H. L.) 43, at p. 49.
(3) December 8, 1803, Mor. Dict. 10,269.
(4) [1892] A. C. at p. 605; 19 R. (H. L.) at p. 44.

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trustee, and that of heritable property as to which the owner has come under some contractual obligation. The latter was the case in *Wylie* v. *Duncan*. (1) Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to re-dispone to Wylie, from whom he took the subjects. But this was a mere personal contract. If he had sold the property and disposed of the proceeds, he might have rendered himself liable to legal proceedings, on the ground that he had put it out of his power to fulfil his obligation; but he would not have been guilty of a breach of trust or brought himself within the reach of the criminal law."

My Lords, the familiar case—sanctioned in all the law books and acknowledged in many decisions—for the application of this law is that which was commented on in this House in *Union Bank of Scotland* v. *National Bank of Scotland*. (2) It is the case of a disposition of heritable property entering the record, but granted concurrently with a back bond which acknowledges that the transaction, although giving the title to the disponee, was truly a security transaction. Nor do I question that the same result could be achieved in a less formal manner. But what is necessary in all such cases is that the question of property itself in what I have ventured to call a real and beneficial sense is settled adversely to the debtor—settled, that is to say, in this way, that the property does not belong to him, but belongs to some one else.

The decisions and dicta in many cases were cited at the discussion, and it would be possible to deal with these in detail. But there are two further considerations which I bear in mind. In the first place, I think that nothing can shake the authority of the case of *Heritable Reversionary Co.* v. *Millar* (3), in which substantially the entire case law relevant to this subject was analysed and focussed in the judgments of Lord Herschell and Lord Watson.

And, in the second place, I feel constrained to add that the only judicial dictum of weight which seems to me to give any

(1) Mor. Dict. 10,269.
(2) 12 App. Cas. 53; 14 R. (H. L.) 1.
(3) [1892] A. C. 598; 19 R. (H. L.) 43.

favour to the argument presented for the bank is that of Lord Westbury in *Fleeming* v. *Howden*.(1) "An obligation," said the distinguished judge, "to do an act with respect to property creates a trust; and if a fiar, bound to fulfil an obligation, acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled." It seems somewhat late in the day to cite the dictum of this eminent judge as creating an invasion into the well-settled principle that a contractual obligation with regard to property which has not effectually and actually brought about either a security upon it or a conveyance of it is not per se the foundation of a trust or of a declarator of trust. As Lord Watson said in *Millar's Case* (2), "I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleeming* v. *Howden* (1) with reference to the nature of the interest which a trustee in sequestration takes in the heritable asset of the bankrupt require considerable modification." Perhaps one ought now to venture distinctly further and to say that it is difficult to reconcile the dictum of Lord Westbury with the decision in *Millar's Case* (2), or to see how the former can now be stated to represent with accuracy the principle of the law of Scotland.

These circumstances, my Lords, make it clear to me that nothing urged by the bank in the present case comes up to what the law requires. For, as I have said, it requires nothing less than this, that the property in the debenture referred to was in the Bank of Scotland. The averments, squaring with the correspondence, are, however, that there was a personal contract with Hutchison, Main & Co. to transfer it to the bank, and that matters stood upon that contract at the time of liquidation. At that time, accordingly, the debenture was part of the property of the bankrupt. It required, in the view of parties, an assignment to divest him of it, and this assignment was not obtained. The case accordingly is the

(1) L. R. 1 H. L. Sc. 372, at p. 383; 6 Macph. (H. L.) 113, at p. 121.

(2) [1892] A. C. at p. 613; 19 R. (H. L.) at p. 49.

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familiar one of an unfulfilled promise to give property or security for goods or benefit which have been received. It is no part of Scotch law to admit a claim of that character to preference in the distribution of bankrupt or liquidation assets.

I am humbly of opinion that the judgment of the Court below is upon that ground correct and should be affirmed.

Interlocutors in part appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 19, 1913.

Agents for appellants: *Ashurst, Morris, Crisp & Co., for Tods, Murray & Jamieson, W.S., Edinburgh.*

Agents for respondents: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 *Feb.* 6.

FOLKESTONE CORPORATION . . . . . APPELLANTS;

AND

BROCKMAN AND OTHERS . . . . . RESPONDENTS.

Street—Private Street Works—Highway repairable by Inhabitants at large—Dedication of Private Carriage Road as Highway for Foot Passengers—Long User—Presumption in Favour of Dedication—Private Street Works Act, 1892 (55 & 56 *Vict.* c. 57), *ss.* 5—8; *Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23.

Per Lord Atkinson: Proof of long, continuous, and uninterrupted user of a way by the public, though it is evidence from which dedication may be inferred, does not create a præsumptio juris in favour of dedication which, unless rebutted, must prevail.

Turner v. *Walsh* (1881) 6 App. Cas. 636 is not an authority to the contrary.

An objection to a provisional apportionment in respect of certain proposed private street works on the ground that the street in question was a highway repairable by the inhabitants at large was overruled by the justices of the borough, subject to a case stated for the opinion of the King's Bench Division. By a private estate Act of 1825 R., a

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* *Present:* EARL LOREBURN, LORD KINNEAR, LORD DUNEDIN, and LORD ATKINSON.

tenant for life of settled lands, was empowered to let the lands on building leases and to set out a competent part thereof for public squares, roads, streets or otherwise for the convenience of the occupiers of the houses to be erected thereon. The road in question was made by R. in 1827 on waste land over which the public had previously been allowed to wander, and, on the completion of the road, residential houses were built along its course. It did not appear that the road was required for any other purpose than the use of the occupiers of the houses. A toll gate and a bar were placed across the road, but with a space left on either side for foot passengers, and at the toll gate and bar were notice boards headed "private road." Tolls were charged for horse and wheeled traffic, but there had been a free user of the road by foot passengers for upwards of eighty years without interruption. The road was repaired by the owner and not by the local authority. There had been no formal dedication of the road under the Highway Act, 1835. Upon these facts the justices came to the conclusion that R. did not intend to dedicate the road as a public highway and that there was in fact no dedication of the road as a highway for foot passengers or otherwise prior to 1836, when the Highway Act, 1835, came into operation; they therefore decided that the road was not a highway repairable by the inhabitants at large:—

Held (Earl Loreburn doubting), that there was evidence to support the conclusions of the justices and that the Court had no jurisdiction to interfere with their decision.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing an order of the Divisional Court upon a case stated by the justices of the borough of Folkestone under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

The appellants, having duly adopted the Private Street Works Act, 1892, pursuant to that Act made a provisional apportionment of expenses to be incurred in executing certain private street works in a portion of a street known as the Lower Sandgate Road lying between the eastern boundary fence of Cliff House and a point 170 yards east of St. Paul's Church Schools, Sandgate. The respondents, who were owners and occupiers of premises situate in this portion of the street, objected to the apportionment on the ground (inter alia) that this portion of the street was a highway repairable by the inhabitants at large.

The justices disallowed the objections, but at the request of the respondents stated a case for the opinion of the King's Bench Division. The facts stated by the special case were as follows:—

The Lower Sandgate Road started from the main highway

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immediately east of St. Paul's Schools, Sandgate, and continued thence south of the cliff to the highway west of the Bathing Establishment, Folkestone, and was about 7000 feet in length. The whole length of the road was shewn on the ordnance plan annexed to the case and lettered A, B, C, C1, D, E, F, and coloured pink thereon. The part of the road to which the apportionment related was that lying between the points lettered B and D. (Par. 4.)

From the evidence of witnesses called, facts admitted, and documents produced and proved before the justices and from facts and circumstances known to them they found as facts:—

(A) That the road in question was made by and at the expense of Jacob, Earl of Radnor, over and upon his lands, and was completed about Midsummer, 1827.

(B) That previously to the making of such road the whole of the land over which it ran from the base of the cliff southward to the beach was wild, uncultivated, and unenclosed, but that the lands on each side of the road lying between the points C1 and D on plan were leased and probably enclosed in 1827 and 1828.

(C) That the town of Folkestone then lay for the greater part below the cliff and around the harbour and at some distance from the main highway from Hythe through Sandgate to Folkestone and the population consisted mainly of fishermen and seafaring folk.

(D) That there was no evidence before the justices of the existence of any road or footway there prior to 1827 or of any steps having been taken to prevent the public from wandering over the locus in quo prior to the making of the road.

(E) That the main highway from Sandgate to Folkestone passed at the top of the cliff roughly parallel to the road in question at an approximate distance therefrom of 180 to 290 yards and was an ancient and commodious highway.

(F) That immediately upon completion of the road in question in 1827, houses of a residential character were erected along its course from Cliff House (point D on plan) westward to the top of the hill (point C on plan) on building plots leased by Lord Radnor, and that all the available plots on this section of the road were built upon within about fifteen years.

(G) That no houses were erected eastward of Cliff House along the course of the road to Folkestone, and upon the development of Folkestone as a watering place the land east of Cliff House, through which the road ran, was ultimately enclosed and planted with trees and shrubs, and walks made over the same by Lord Radnor for the use and enjoyment of the general public.

(H) That there was no evidence before the justices that the road in question was required for any purpose except the use of the occupiers of the houses erected along its course (by his lordship's lessees), their servants, tradespeople and visitors, for which purpose it was in fact necessary. But there was evidence before them and they found that from the year 1831 the road was to some extent used by inhabitants of Folkestone and Sandgate other than the said lessees, &c., for business and other purposes.

(I) That there was a toll house and gate across the road about 4300 feet east of St. Paul's Schools (point E on plan) at which tolls for horses and vehicular traffic had been levied since a period antecedent to 1836 to the present time.

(J) That spaces were and had been since a period antecedent to 1836 left on either side of the toll gate for foot passengers.

(K) That there was also a bar fixed by the side of the road near Victoria Pier (point F on plan) adapted for closing the road to wheeled traffic, with a footway left clear on either side, but there was no direct evidence when such bar was placed there.

(L) That both at this bar and at the toll house there were notice boards fixing the rate of toll for horse and wheeled traffic, and both boards prohibited the passage of licensed motor cars, cattle and sheep along the road, but did not prohibit the free passage of foot passengers.

(M) That the notice board near Victoria Pier was headed "Private road to Sandgate," and that at the toll house "Private road" only, and both boards were fixed and maintained by the estate office.

(N) That there was also prior to 1836 a bar fixed at the foot of the hill near the Riviera Road (point B on plan) which the justices found to have been used to close the road on one occasion in 1835, but not so as to prevent the passage of foot passengers.

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(o) That the tolls had always been collected at the toll gate only for through wheeled traffic over the road both ways, but carriages had been driven from Sandgate as far as the toll gate and then turned back without payment of toll. The justices had no evidence whether or not Lord Radnor knew of and assented to such acts.

(p) That prior to 1836 the road in question was never kept in proper repair, but was open for foot passengers without interruption and had so continued to the present time.

(q) That there was no evidence before the justices of any made footpath on the road before 1836, but they found that foot passengers used the whole width of the road and the banks by the sides of the roads (where practicable) at that period without let or hindrance.

(r) That the road in question had always been repaired by Lord Radnor or his lessees, and had never been repaired by the local highway authority.

(s) That the local authority had placed lamps along the road and lighted it, but there was no evidence before the justices to shew that this was done prior to the coming into force of the Public Health Act, 1875.

(t) That there had been no formal dedication of any part of the road as prescribed by s. 23 of the Highway Act, 1835. (Par. 5.)

The appellants (the respondents in the case) produced and proved certain minutes of meetings of the Commissioners of Pavements of the town of Folkestone, acting as such under a local Act, and held on November 17, 1851, and February 18, 1852, respectively, which established the fact that William, Earl of Radnor, as the result of negotiations with the commissioners in 1851, made up at his own cost the section of the road lying between the points lettered A and B on the ordnance plan conditionally upon the commissioners adopting the future maintenance thereof. And that the commissioners by resolution took over the section of the road referred to on the terms stated. The minutes did not shew, and no evidence was before the justices, that the provisions of s. 23 of the Highway Act, 1835, were complied with at the time. (Par. 6.)

The respondents (the appellants in the case) produced and put in evidence a copy of Lord Radnor's private Act, 1825 (6 Geo. 4, c. xxvii.), which conferred powers (s. 1) to lease with liberty for the lessees to lay out and appropriate any part or parts of the ground comprised in the lease "as and for streets, paths, passages, or ways for the more convenient enjoyment of such houses, &c.," and (by s. 5) the Earl was empowered to allot and set out a competent part of the ground described in the schedule "for public squares, roads, streets, ways, avenues, or otherwise for the use and convenience of the occupiers, &c." (Par. 7.)

Upon their findings of fact the justices came to the conclusion that it was not the intention of Jacob, Earl of Radnor, in 1827 or later, to dedicate the road in question as a public highway; that there was in fact no dedication of such road as a highway prior to March 20, 1836; and that since that date there had been no dedication as prescribed by s. 23 of the Highway Act, 1835. They therefore decided that the road in question was not, nor was any part thereof, a highway repairable by the inhabitants at large and that it was a "street" within the meaning of the Private Street Works Act, 1892. They accordingly approved and affirmed the provisional apportionment, subject to certain amendments with regard to the character of the proposed works as agreed between the parties.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

The Divisional Court (Lord Alverstone C.J. and Hamilton and Bankes JJ.) ordered that the matter should be remitted to the justices to say whether they had found that there was no dedication of the road in question as a highway for foot passengers before the year 1836, and that if they had so found their decision should be affirmed, but that if they had found that there was dedication their decision should be reversed.

The justices stated that they had found that there was no dedication of the road in question as a highway for foot passengers, and their decision accordingly stood affirmed.

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The Court of Appeal (Vaughan Williams and Buckley L.JJ., Fletcher Moulton L.J. dissenting) reversed the decision of the Divisional Court and of the justices.

1913. Oct. 28, 30. *Ryde, K.C.*, and *R. W. Turner* (*Sir Robert Finlay, K.C.*, with them), for the appellants. 1. There was evidence to support the finding of the justices that there was no dedication of this road for foot passengers prior to March 20, 1836, the date at which the Highway Act, 1835, came into operation, and therefore the Court of Appeal had no jurisdiction to disturb that finding. The appellants admit that a dedication for foot passengers only is legally possible—they do not rely upon *Roberts* v. *Karr* (1)—but they contend that no such dedication has taken place in fact. Lord Radnor was developing his property as a building estate and must have intended that there should be some access to the inhabitants of the houses. The leaving of the spaces for foot passengers in the circumstances was not inconsistent with an intention not to dedicate. The notice boards headed "private road" prima facie refer to the whole road including the footpath. Taken as a whole the evidence is as consistent with an intention not to dedicate but to allow a limited user to tradesmen, &c., going to the houses as with an intention to dedicate, and in that state of things dedication will not be inferred.

2. Lord Radnor was tenant for life only and apart from the provisions of the private Act of 1825 he had no power to dedicate a way as a highway as against the remaindermen: *Eyre* v. *New Forest Highway Board.* (2) It was competent for Lord Radnor apart from that Act to lay out private roads for the use of the occupiers of the houses to be erected without dedicating such roads to the public. By s. 5 of that Act power was conferred upon Lord Radnor to set out a competent part of the ground as a public road for the convenience of the occupiers. The Court of Appeal held that that power included a power to dedicate, but upon the evidence there was here no setting out of a public road within that section. Lord Radnor set out a road as a private road and the acquiescence as to the user of the road by foot passengers was not in the

(1) (1808) 1 Camp. 262, n. (2) (1892) 56 J. P. 517.

circumstances sufficient to prove dedication. There was no setting out of a footpath as distinct from the road. A wider user following upon a restricted user is not conclusive as to dedication: *Rex* v. *Inhabitants of St. Benedict.*(1) *Rishton* v. *Haslingden Corporation* (2) is distinguishable from the present case; if not, it was wrongly decided and ought to be overruled. Otherwise a person has only to lay out a road on a public footpath to enable him to set at naught the provisions of the Private Street Works Act, 1892. [They also referred to *Cababé* v. *Walton-on-Thames Urban District Council* (3) as to the effect of s. 23 of the Highway Act, 1835.]

Cave, K.C., and *Randolph A. Glen*, for the respondents. If the street is as a footway a highway repairable by the inhabitants at large the local authority cannot put in force the provisions of the Private Street Works Act, 1892. *Rishton* v. *Haslingden Corporation* (2), which has been followed in *Kingston-upon-Thames Corporation* v. *Baverstock* (4), is expressly in point and there is no ground for impeaching that authority. On the footing of that case being good law the respondents must shew that this is a public footway repairable by the inhabitants at large. It is settled that apart from the Highway Act, 1835, a highway dedicated to the public is repairable by the inhabitants at large: *Rex* v. *Inhabitants of Leake* (5); *Eyre* v. *New Forest Highway Board.* (6) Therefore dedication before 1836 is conclusive. The justices have found, in effect, that there was dedication before that date, for they have themselves found facts amounting to dedication, and it matters not that they have drawn from those facts a conclusion of law that there was no dedication, that being inconsistent with their findings. If the justices find facts which in the minds of reasonable men can only lead to the opposite conclusion to that at which they have arrived, then the matter is not beyond the jurisdiction of the appellate tribunal. It is not suggested that the justices have come to a perverse decision, but

(1) (1821) 4 B. & Ald. 447.
(2) [1898] 1 Q. B. 294.
(3) [1913] 1 K. B. 481 (since affirmed by the House of Lords, ante, p. 102).
(4) (1909) 7 L. G. R. 831.
(5) (1833) 5 B. & Ad. 469, at p. 482.
(6) 56 J. P. 517.

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they have put the facts before the Court and have submitted to them the question whether they have come to the right conclusion upon them. Or the point may be put as it was put by Buckley L.J. "These facts amount in law to dedication." It was an error of the justices to limit themselves to the facts before 1836. The fact of eighty years' public user as a footpath with no single case of interruption is material to be taken into account in considering whether there has been dedication before 1836. The whole evidence must be taken together to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption then is of a complete dedication coeval with the early user: *Turner* v. *Walsh*. (1) Every specific fact is found in the respondents' favour. It follows then that the conclusion of the justices was wrong. It is said that no one was competent to dedicate until after 1836; but after so long a user, there being power under the private Act of 1825 to dedicate, the maxim omnia præsumuntur rite esse acta applies: *Leigh Urban District Council* v. *King* (2), where the Court held that the justices were right in presuming that the formalities required by s. 23 of the Highway Act, 1835, had been complied with. Dedication ought to be presumed from long and continuous user without interruption in the absence of evidence to the contrary. This is a presumption of law, and if the case had been tried before a judge and jury the judge should have directed the jury to find a verdict in favour of dedication: Taylor on Evidence, 9th ed., vol. i., § 131; *Turner* v. *Walsh* (3); *Rex* v. *Lloyd* (4); *Farquhar* v. *Newbury Rural District Council* (5); *Attorney-General* v. *Esher Linoleum Co.* (6); *Reg.* v. *Petrie*. (7) The justices have failed to give effect to this presumption.

[LORD ATKINSON. Is there any case where upon uncontradicted evidence of long user the judge has directed a verdict in favour of dedication?]

The respondents know of no such a case. But it has been

(1) 6 App. Cas. 636, at p. 642.
(2) [1901] 1 K. B. 747.
(3) 6 App. Cas. 636, at pp. 639 and 640.
(4) (1808) 1 Camp. 260.
(5) [1909] 1 Ch. 12, at p. 16.
(6) [1901] 2 Ch. 647.
(7) (1855) 4 E. & B. 737.

laid down that in such circumstances the jury ought to find dedication.

[LORD ATKINSON referred to *Blount* v. *Layard.* (1)]

The facts raise a presumption of deliberate dedication before 1836. [They contended further that s. 23 of the Highway Act, 1835, did not apply to highways for foot passengers, and they referred to *Portsmouth Corporation* v. *Smith* (2) as to the meaning of the word "street." They also referred to *McLaughlan* v. *Anderson.* (3)]

Sir Robert Finlay, K.C., in reply. Dedication is a question of fact, and the only point open to the appellate tribunal upon a case where justices have come to a conclusion of fact is, as is shewn by *Rishton* v. *Haslingden Corporation* (4), whether there was any evidence to support their finding. Upon the facts found in the case it is impossible to contend that the justices were bound in law to say that there had been dedication of this foot-path before 1836. If they had come to that conclusion it would have been erroneous. Up to the date of the passing of the private Act of 1825 there was a mere permissive user by the public over the waste land which subsequently formed the site of the road, and Jacob, Earl of Radnor, was tenant for life with no power to dedicate. Lord Radnor in laying out this carriage road was not exercising the powers conferred on him by s. 5 of the Act of 1825. He could lay out a private carriage road without the aid of the Act. After laying out this road he allowed the public to walk along the road as formerly he had allowed them to wander over the waste, and the subsequent user of the road by foot passengers was merely permissive. In the face of the notice boards warning the public that this was a private road it would be extravagant to infer a dedication of this carriage-way for foot passengers. If this were a highway for foot passengers it would be repairable by the inhabitants at large, but the evidence shews that the repairs were always done by Lord Radnor. The negotiations of 1851-52 point to the same conclusion. They are wholly inconsistent with the idea that the commissioners were

(1) [1891] 2 Ch. 681, n.
(2) (1885) 10 App. Cas. 364, at p. 375.
(3) 1911 S. C. 529, at p. 532.
(4) [1898] 1 Q. B. 294, at p. 301.

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under any liability to repair. Further, the nature of the user is such that the presumption in favour of dedication does not arise; but if it does arise there is ample evidence to rebut it. This is not the case of a user from point A to point B; therefore the respondents' case fails in its inception. There can be no presumption of dedication from this permissive user. Looking at the nature of the user and the surrounding circumstances, the notice boards, and the fact that the repairs were done by the owners, the justices were right in their conclusion. Lord Blackburn in *Mann* v. *Brodie* (1) lays it down that long user is not conclusive evidence of an intention to dedicate, and Lord Watson says (at p. 398) that any presumption which a jury might or ought to draw from uncontradicted evidence of user is matter not of law but of fact. In *Greenwich Board of Works* v. *Maudslay* (2) Blackburn J., as he then was, says that to establish a right of way it must be shewn that it has been used openly as of right and for so long a time that it must have come to the knowledge of the owner of the fee that the public were so using it as of right. In such a case, he says, the jury might fairly draw the inference of dedication. But to draw such an inference in the present case would be inconsistent with all the facts. *Leigh Urban District Council* v. *King* (3) was concerned with the formalities to be complied with under s. 23 of the Highway Act, 1835, and has no application. *Farquhar* v. *Newbury Rural District Council* (4) turned upon very special facts. *Turner* v. *Walsh* (5) has no bearing on the question of what is the duty of the Court where power is given to state a case solely on a question of law.

The decision of the justices was a mere finding of fact, and, there being evidence to support it, it cannot be disturbed.

The House took time for consideration.

1914. Feb. 6. LORD KINNEAR. My Lords, the question to be considered in this case is whether a certain road had, before March 20, 1836, been effectually dedicated to the public as a

(1) (1885) 10 App. Cas. 378, at p. 386.
(2) (1870) L. R. 5 Q. B. 397.
(3) [1901] 1 K. B. 747.
(4) [1909] 1 Ch. 12.
(5) 6 App. Cas. 636.

highway for foot passengers. The importance of the date is owing to the Highway Act, 1835, because after that Act came into force roads could not be lawfully dedicated so as to be deemed public highways repairable by the inhabitants at large, except in accordance with statutory requirements, which have not been complied with in this case. It does not follow that use by the public since 1836 may not be so connected with prior user as to be treated as evidence, so far as it goes, to prove an earlier dedication. But the fact to be proved is that the road was dedicated before the Act, at a time when such dedication, if accepted by the public, would have been lawful.

The question arises on a special case stated by the justices of the borough of Folkestone for the opinion of the King's Bench Division. The justices have decided that there has been no dedication in fact; and on matter of fact it is not disputed that their decision is final, the jurisdiction of the Court, and, therefore, of this House on appeal, being confined to the determina- of questions of law. The particular question of law which the justices propose for consideration of the Court is not formulated with precision. But in the special case they state distinctly certain specific facts relating to the history and use of the road, and the question seems to be whether, when the facts so specified had been proved, it was still open to the tribunal to draw a further inference of fact one way or the other, or whether the necessary conclusion was already fixed by a rule of law.

I do not think it necessary to recapitulate the facts in detail. But the main points may be briefly stated in order to see how the question of law arises. The road was made in 1827 by Jacob, Earl of Radnor, over lands of which he was a life tenant. The ground over which it was constructed lies between the base of the cliff and the beach, at some little distance from the highway between Sandgate and Folkestone; and before the road was made it was open and waste, and people were allowed to wander over it at pleasure. Immediately upon completion of the road in 1827, houses of a residential character were erected along its course on building plots leased by Lord Radnor; and the road in question was constructed, and was necessary for the use of the occupiers, their servants and tradespeople. There was no

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evidence that it was required for any other purpose, although it was in fact used, as the justices say, "to some extent" by the inhabitants of Folkestone and Sandgate other than Lord Radnor's lessees. It was constructed as a horse and carriage way, and was never open to the public in that character. But while the passage of horses and carriages was regulated by the erection of barriers and toll bars, no barrier of any kind was erected to exclude foot passengers. There was no defined footpath, and people who traversed it on foot used the whole width of the road and the adjacent banks at pleasure. The result was that the public, who had been accustomed to stray over the waste ground before the road was made, were allowed to do so after its completion, and nothing was done to prevent their entering upon it at any point in its course, or to prevent their using it as a means of passage between two points on the highway from Sandgate to Folkestone. This public enjoyment of the road had continued, when the present question arose, for more than eighty years. In the meantime, the road was repaired, when necessary, by the owner of the soil, and never by a public authority.

Along with these facts there must be taken into account another of a different description, as throwing light on the probable intention of the landowner. The lands were held by Earl Jacob in strict settlement, and as tenant for life he had no power to dedicate a right of way to the public. His disability was so far removed by a private Act of Parliament in 1825 as to enable him to "allot and set out a competent part of the ground for public squares, roads, streets, ways, avenues, or otherwise for the use and convenience of" such houses as might be built on part of the estate over which he was authorized to grant building leases. But during the short period between 1827 and 1836 he made no actual allotment, and did nothing to set out a competent part of the ground for a footpath, unless his submission to the public user is enough to satisfy these conditions, and after 1836 the Highway Act made dedication impossible.

On consideration of these facts the justices say that they came to the conclusion that it was not the intention of Jacob, Earl of Radnor, in 1827, or later, to make and dedicate the road in question as a public highway; that there was in fact no dedication of such

road as a highway prior to March 20, 1836; and that since that date there has been no dedication as prescribed by s. 23 of the Highway Act, 1835. They "therefore decided that the road in question is not, nor is any part thereof, a highway repairable by the inhabitants at large, and that it is a street within the meaning of the Act of 1892 . . . . ," and the question they propose for the opinion of the Court is whether, upon the above statement of facts, they had come to a correct determination in point of law. It is unnecessary to consider the final decision which is deduced from the findings I have quoted, that the road is a street within the Private Street Works Act, 1892, because that point is not now in controversy; and it is common ground that the special case is so framed as to raise the question really in dispute, namely, whether the conclusion that there has been no dedication can be set aside as erroneous in law.

On this question it appears to me, in the first place, that the three propositions embraced in this conclusion are, all of them, affirmations of fact within the exclusive jurisdiction of the justices. This was evidently the view of the King's Bench Division, because after certain procedure the judgment of the justices was affirmed, although in the course of the procedure it is indicated clearly enough that the learned judges would probably have come to a different conclusion if it had been open to them to determine the question of fact for themselves. They thought it doubtful whether the justices had not meant to decide only that there was no public carriage-way, without having addressed their minds to the question of the existence of a public footway, and accordingly they remitted the matter to the justices who had stated the case in order that they might say whether they had found that there was no dedication of the road in question as a highway for foot passengers before the year 1836; if they had so found, it was ordered that their judgment should be affirmed, and if they had not come to any decision on the said question, it was ordered that they were to determine whether the road was dedicated as a highway for foot passengers before 1836 or not. It is evident that no such remit could have been made if the learned judges had not been satisfied that dedication or no dedication was a question of fact for the justices, and not one of

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law for the Court, and accordingly, when the justices reported that they had found that there was no dedication of the road as a highway for foot passengers before 1836, their judgment stood affirmed. I think this was perfectly right. Dedication, in my opinion, is matter of fact, and whatever their view of the evidence might have been, the learned judges, as they properly held, had no power to overrule the decision of the justices.

It is said that they should have come to a contrary conclusion in law, because user creates a præsumptio juris in favour of dedication. This proposition is too vague to be helpful in argument, since each of its terms is ambiguous. The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by Lord Blackburn in *Mann* v. *Brodie*. (1) He begins by citing the doctrine laid down by Parke B. in *Poole* v. *Huskinson* (2): "'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence and no more.'" And then he adds more particularly with reference to the effect of user, that "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he was."

The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee. The cases in which the law is stated in the same way are numerous, but I refer to one in

(1) 10 App. Cas. 378, at p. 386. (2) (1843) 11 M. & W. 827, at p. 830.

particular in which it was so laid down by Lord Chancellor Halsbury, *Macpherson* v. *Scottish Rights of Way and Recreation Society* (1), because I think his Lordship's observations bring out very sharply the determining fact of which in a case like the present the judges of fact must be satisfied, before they can find room for the application of any presumption of law. The law of Scotland as to rights of way differs from that of England in this respect, that the public right, as Lord Watson more fully explains in *Mann* v. *Brodie* (2), is not rested upon any theory of dedication, but upon acquisitive prescription; but the two laws agree in this, that the public use from which a right of way is to be inferred must be had as of right. With reference to this difference, the Lord Chancellor says: "The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer that the owner had a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland; and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then, as I understand the law of Scotland, that establishes absolutely the right of way in question."

He goes on to point out that a question had been asked by a dissentient judge in the Court below, which required an answer if the judgment was to be supported. "A question is put by Lord Young to which, if I were not able to give an answer, I should feel that the respondents ought to be able to furnish it to me. Lord Young, quoting the Lord Ordinary, says 'The question is whether such use as has been proved is to be ascribed to tolerance or right. Why, I venture to ask,' says Lord Young, 'is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered with it by appealing to a Court of law to prevent such use of it, upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly.' Now I say," says the

(1) (1888) 13 App. Cas. 744. (2) 10 App. Cas. 378.

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Lord Chancellor, "that if no answer could be given to that question, I should take a different view from that which I have been at last compelled to take." I think Lord Young's question is exactly that which would have required an answer in the present case, if we had been concerned with matter of fact. But it was for the justices to answer it; and their answer is final. It appears from the special case that the law laid down by Parke B. had been cited to them, and they followed it correctly, when they put to themselves, as the first question to be decided, whether the facts proved before them justified the inference that Lord Radnor intended to dedicate a highway. They answer that question of fact in the negative, and I see no ground in law upon which it can be held that a Court which is forbidden to interfere with their decisions of fact is nevertheless entitled to declare that conclusion is wrong. No power to disturb it can be drawn from the doctrine that from sufficient user dedication is to be presumed, because the question is whether the facts are sufficient to raise the presumption.

It is admittedly præsumptio juris and not juris et de jure, or, in other words, it is not an absolute and inflexible rule of law which imposes a pre-ordained conclusion upon the judges of fact. There are such presumptions of law, which, in effect, are merely fictitious, so that, as it is said by a high authority, the law may presume a grant when nobody supposes that a grant ever existed. But the presumption of dedication from user is of an entirely different kind. It is a probable inference from facts proved to the fact in issue, and it follows that in a particular case it is for the judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn. It is conceded by the learned Lords Justices in the majority that the presumption may be rebutted; but, with great respect, it seems to me to be so treated in the argument as to give it all the effect of an absolute rule. I think it fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached. I concede that a presumption of law, once it has been established, throws the onus of proof upon the party who disputes it; and when it rests upon a definite fact which

may be proved with certainty or may be admitted, it may be easy to determine at what stage the onus has been shifted. But in the simplest case, rules for fixing the onus of proof do not determine the value of conflicting evidence when the proof has been completed; and in the present case the presumption rests upon the interpretation, in a particular way, of conflicting and ambiguous facts; and the right interpretation cannot be reached until the whole body of evidence has been considered. It then becomes a question for the judges of fact whether the user which may have been proved is to be accounted for by presuming dedication, or whether some other conjecture may not be the more probable. It seems to me to follow that the presumption cannot be held to be established in law at any intermediate stage of the proof, or until the whole facts and circumstances have been fully considered by the proper tribunal.

I admit that if it is given without evidence, or against evidence, the decision of the justices, like the verdict of a jury, may be set aside, not because it is erroneous, but because it is arbitrary. That is a rule of law which is well settled. But it has no application to the present case. The burden of proof lies in the first place on the respondents, who allege dedication, because he who affirms must prove. They adduce a body of evidence which makes it probable that the owner of the fee should have intended to dedicate. But ex hypothesi it is not conclusive evidence, for if it were, there would be no room for presumption; and the presumption which the law allows may be stronger or weaker. If therefore the tribunal which has to judge of the fact think that in all the circumstances of the particular case it is not strong enough, they may be right or wrong, but they are not chargeable with arbitrary excess of jurisdiction if they decline to draw the inference.

The result is that the respondents have failed to prove their case. But the appellants do not by any means rest their own case upon this negative conclusion. They say, and I think with force, that all the facts connected with the origin and history of the road are in favour of a presumption of tolerance, and against a presumption of dedication. The public, or such of them as chose to go there, were already in enjoyment of the locus over

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which the road was made; it was constructed and maintained as a private road for horses and carriages, and it never was dedicated as a public highway for these purposes; it made no special provision for the use of foot passengers, and nothing was done by Lord Radnor to suggest that he intended to allot and set aside any part of the ground, as a competent part for a public footway, and so dedicate it in the only way in which, as a limited owner, he could properly create such a burden upon an estate held in strict settlement. It is true that he did not interfere to obstruct the way for foot passengers, but to do so would have been churlish in the highest degree; it would have been exceedingly troublesome to keep them off, and he had no interest to adopt a policy so vexatious and so invidious. They argue that, on the one hand, no reasonable proprietor would have interfered with foot passengers in these circumstances, and that, on the other hand, no one would have dreamed of creating, without necessity, so anomalous a right as a public footway repairable by the inhabitants at large superimposed, without delimitation, upon a private carriage-way repairable by the proprietor. Why, then, must it be assumed that he had a real intention to create a new public right, or that the foot passengers who came upon his road were not there by his tolerance or permission, or why should the public have believed anything so improbable?

I express no opinion as to the weight which should be given to these considerations, because I am not deciding the question of fact. But I do not understand how they can be supposed to be irrelevant to the question whether the public user is to be ascribed to the permission or licence allowed by successive proprietors or to the deliberate intention of Lord Radnor formed and carried into effect before 1836 to dedicate a highway to the public. The question is one of fact, turning upon probabilities of conduct, which cannot be estimated by antecedent rules of law. I think it a very fair test of the argument to inquire how the question would have been treated if it had been tried by a jury. I was impressed by the observation of my noble and learned friend Lord Atkinson during the argument, when he asked whether there was any case in which a jury had been directed that they were bound in law to presume dedication. No such case was cited, and I think

that *Turner* v. *Walsh* (1), in the Privy Council, on which the respondents' counsel relied, is a high authority to the contrary. It was held to be a right direction to a jury that user might be relied on in New South Wales in the same way as in England for the purpose of raising the presumption of a dedication of a road over Crown lands, and that the evidence was sufficient to entitle them to presume dedication by the Crown. This left it for the jury to determine whether the facts raised the presumption. The plain meaning of the words is not that they were bound by law to presume, but that it was within their competence to do so, and that implies that they must judge for themselves whether to make the presumption or not. This is even more clearly brought out by the observations of Sir Montague Smith on the main point on which the appeal appears to have been taken. After a user of twenty-one years, an Act had been passed in 1861 which was said to exclude dedication by the Crown, except by a certain prescribed method. Assuming this to be the effect of the Act, Sir Montague Smith says it is proper to look at the whole evidence together to see whether there had been such a continuous and connected user as was sufficient to raise the presumption of dedication prior to the statute at a time when the Crown had power to dedicate, and he : adds " It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption has been increased by the subsequent user, and would certainly have been much diminished if the user had been discontinued after 1861."

But then if the strength of the presumption may be increased or diminished according to circumstances, it is for the jury to determine the weight which should be given to it in the particular case. This is entirely in accordance with the general rule laid down by Sir Montague Smith when he says, " From long continued user of a way by the public . . . . dedication . . . . in the absence of anything to rebut the presumption, may and indeed ought to be presumed." This does not mean that it must be presumed even in the absence of rebutting evidence, but that the sound inference in the case supposed would be in favour

(1) 6 App. Cas. 636.

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of the presumption. It still remains a question of fact whether the presumption has been established. The phrase "ought to be presumed" has been construed by Lord Chancellor Cranworth in *Young* v. *Cuthbertson* (1), where it had been used by Lord Justice-Clerk Hope in charging a jury; and Lord Cranworth, criticizing what he describes as "looseness" in the mode of directing juries, says: "I however understand the learned judge when he used the expression 'the jury ought to presume,' not to be stating a proposition in law on which the jury were bound to act, but merely to be pointing out what was almost an irresistible inference in point of fact." I take it, therefore, that the application of the presumption in a particular case is a question of fact for the jury, and not a question of law for the Court.

Buckley L.J. says that the justices have decided a question of mixed fact and law. If so, it was within their competence so to decide. But the case cannot be treated in the same way by a Court of law, which has no jurisdiction to decide questions of fact. It became necessary, therefore, for the King's Bench Division to disentangle the law from the fact, so far as necessary to explicate their own limited jurisdiction. I think they did so successfully when they decided, as Hamilton J. puts it, that, as the matter was one of fact and there was some evidence, it must go back to the justices for their determination. It does not appear to me, with great respect, that the issues of fact and law are so clearly distinguished when the learned Lord Justice says that the justices have found facts which amount in law to dedication. He fails to advert to the critical fact with which they introduce their conclusions, namely, that it was not the intention of Lord Radnor to dedicate the road as a public highway, and I assume that, in speaking of the facts they have found, he refers to the detailed facts which are really no more than evidence from which the fact in issue—to wit, dedication—may or may not be inferred. On the question so raised, as I have already said, I am of opinion that the decision of the justices is final and conclusive as a decision of fact, that the Court below had no authority to inquire whether in fact it was right or wrong, and that no ground has been brought forward for setting it aside as contrary to law.

(1) (1854) 1 Macq. 455, at p. 460.

I think, therefore, that the order of the Court of Appeal must be reversed, and that of the King's Bench Division restored.

LORD ATKINSON. My Lords, the question for decision in this case is raised by the justices of the peace of the borough of Folkestone, on a case stated by them under the provisions of the 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, for the opinion of the King's Bench Division of the High Court of Justice. It is admitted that under these statutes such a case can only be stated in reference to their determination on a point of law, and that the Court whose opinion is asked for can only determine the question or questions of law arising on the case. The proceedings in which the determination of the justices took place were brought under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), which the appellants, the mayor, aldermen, and burgesses of the borough of Folkestone, had adopted. This body, asserting that about 7000 feet in length of a certain road within their borough, called the Lower Sandgate Road, from a point immediately east of St. Paul's School, Sandgate, where it joins the main highway, to a point to the westward of the Folkestone bathing establishment, was a street, or, if not, that the portion of it between two points lettered B and D on the ordnance sheet given in evidence in the case was a street, within the meaning of this statute, proposed, in exercise of the powers conferred upon them by the 6th section of the Act, to execute certain works upon it and to charge the cost thereof upon the premises fronting or abutting upon it.

The expression "street" is defined in s. 5 of the Act to mean (unless the context otherwise requires) "a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large." The respondents, who are frontagers, in exercise of the powers conferred upon them by the statute, served upon the appellants notices setting forth their objections to the proposal of the latter on the following grounds, amongst others: (1.) that the portion of the street upon which the works were proposed to be executed did not form part of a street within the meaning of the Act of 1892, and (2.) that the said part of the same is a "highway repairable by the inhabitants at large."

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During the hearing before the justices a question was evolved upon which the case turned, namely, whether the lord of the soil, Jacob, Earl of Radnor, the owner of the land upon which this street was made, had before the year 1836 effectually dedicated to the public a right of way over it for passengers on foot. It was conceded on both sides that if he was found to have done so, and the dedication had, by user, been accepted by the public, then the street would have been repairable by the inhabitants at large, at least to the extent necessary for the exercise by the public of their limited right of way, and would by the definition clause have been excluded from the operation of s. 6 of the Act.

The justices found that there was no dedication by the said Earl of the said road, or the portion of it already mentioned, to the public as a highway for foot passengers before the year 1836, and in the case stated by them they set forth that the question they referred to the Divisional Court for its opinion was whether their finding on this point was correct in point of law. This was the question of law, and the only question of law, which the Divisional Court had to determine.

After certain proceedings, immaterial for the purposes of this appeal, had been taken, that Court ultimately answered the question put to them in the affirmative. The Court of Appeal by the order now appealed from reversed this decision on the ground, as stated by Vaughan Williams L.J. (Appendix, pp. 64 and 65), that there was nothing in the findings of fact appearing in the special case justifying the conclusion of the justices that it was not the intention of Jacob, Earl of Radnor, in 1827 or later, to make and dedicate the road in question as a public highway, or that there was, in fact, no dedication of such road as a highway prior to March, 1836, and he therefore answered the question put by the justices in the negative. He further stated that, in his opinion, "there was sufficient evidence that this road was so used as a highway or footway prior to 1836 to justify the conclusion that there was a dedication by Lord Radnor, who acquiesced in such user."

Buckley L.J. (p. 74) stated the grounds of his decision thus: "I cannot find that in finding these facts the justices have found any relevant facts to negative the dedication, which in my

judgment is evidenced by the facts to which I have first referred." That appears to be the user. Fletcher Moulton L.J. dissented.

It would appear, I think, from the double negative form in which the alleged error of the justices is thus stated, that the line of reasoning adopted by counsel for the respondents in their argument before your Lordships was in the Court of Appeal only too successful. It was, as I understood it, to this effect: "Proof of open, uninterrupted, and continuous user raises a præsumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. Tribunals which are exclusive judges of fact, whether juries or justices, are bound in law to act upon it, and their finding against it is an error in law. In the present case there was such evidence of user, no rebutting evidence was produced, the justices were therefore bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law." What the justices have really and in fact done is not to find a negative without any evidence to support it, but they have refused, on the evidence laid before them, to find the affirmative proposition contended for by the respondents that the owner, the Earl of Radnor, had intended to dedicate, and had dedicated, this footway to the public. The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing, unless it be the law that in such cases where open, long-continued, and uninterrupted evidence of user is clear, unrebutted, and unexplained, the tribunal whose members are the exclusive judges of issues of fact are bound in law to draw this affirmative inference, and consequently that in every case where the question of the dedication to the public of a highway is tried before a judge and jury, and strong evidence is given of user by the public, while no evidence rebutting the so-called præsumptio juris thereupon arising is produced, the litigant relying upon dedication must necessarily be entitled to have a verdict directed for him. During the argument, in order to test the soundness of this line of reasoning, I asked to be referred to any case where in a trial before a judge and jury a verdict was directed under such circumstances. No such

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authority was produced. I believe it would have been produced had it existed. I think it does not exist. On the contrary, the invariable well-established practice, followed by many of the most able and distinguished judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, to ask them to consider it as a whole, and determine whether the owner of the soil intended to dedicate to the public a highway over it. The justices in cases such as the present are, if anything, more absolute and exclusive judges of fact than is the jury in a trial before them. Their finding cannot, like the finding of a jury, be set aside as against the weight of evidence. Order XL. and such like Orders of the Rules of the Supreme Court, 1883, do not apply to their findings as they do to the verdict of a jury. I am unable, therefore, to discover on what principle their decision can be set aside as contrary to law because they have refused to find in a way in which a jury in a similar case would not have been directed to find or be bound to find. I propose, therefore, to test the soundness of the reasoning upon which the Court of Appeal have apparently acted by reference to the procedure followed on the trial of questions such as this before a judge and jury, and as the point is of general importance, one may be excused for dealing at some length with a few of the best-known authorities. In *Poole* v. *Huskinson* (1) Parke B. thus states the principle of the law: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than any acts of enjoyment."

Lord Blackburn, after quoting this passage in *Mann* v. *Brodie* (2), said: "But it has always been held that where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on

(1) 11 M. & W. 827, at p. 830. (2) 10 App. Cas. 378, at p. 386.

which those who have to find the fact may find that there was a dedication by the owner whoever he was." And the remarks of Lord Watson at p. 398 shew that under the Scotch law the inference which a jury may draw from evidence of user is an inference not of law but of fact.

In *Barraclough* v. *Johnson* (1) it was proved that in the year 1814 the representative of the owner of the soil of a laneway entered into an agreement with a certain company, together with the surveyor of highways acting on behalf of the inhabitants of a hamlet, that this laneway should be open to carriages, that the company should pay an acknowledgment of 5*s.* per annum and supply cinders for the repair of the road, which the people of the hamlet should spread. Up to this time there had been a gate across the laneway which was kept locked and carriages stopped, but apparently passengers and horses were allowed to pass. In 1832 disputes arose between the parties when the passage of carriages was prevented by the proprietor, but from the date of the agreement up to this time the lane was open and carriages, horses, and pedestrians allowed to use it. An action was then brought. The judge, Patteson J., left all the evidence to the jury and instructed them "that, although user was evidence of a dedication to the public, yet the question always was what the landowner intended, and, if it appeared that he had not intended absolutely to dedicate, the inference from user failed: and that in the present case, unless the jury thought that the proprietor, in 1814, intended absolutely to dedicate the carriage road to the public, he might resume it if the bargain was broken by the other parties." The jury found that there was no good dedication of the carriage way, but that there was a dedication of the way for foot passengers and horses. No direction was given to the jury that they were bound to find as to the footway where the user had been continuous, or any intimation given that there was a presumption in favour of dedication of either right of way, which, unless rebutted, should prevail. A Court consisting of Lord Denman C.J. and Littledale, Patteson, and Coleridge JJ. upheld the verdict, Patteson J. using these words: "I think that the intention to dedicate or not must be left to the jury. The very term

(1) (1838) 8 Ad. & E. 99.

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dedication shows that the intent is material. There cannot be such a thing as turning land into a road without intention on the owner's part."

This case was cited with approval by Lord Macnaghten in *Simpson* v. *Attorney-General.* (1) At p. 493 he said: "As regards the second, it is, I think, enough for me to say that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication: *Barraclough* v. *Johnson.*" (2)

The Queen v. *The Inhabitants of the Tithing of East Mark* (3) was the case of an indictment for non-repair of a road which had been formed over part of the waste land of a manor, and had been set out as a private road by an award, dated in January, 1797, of commissioners acting under a private enclosure Act. By this award a certain portion of this waste had, as directed by the Act, been allotted to the lord of the manor in respect of his interest in the soil. Evidence had been given, which was apparently not contradicted, that the road had been used by the public generally ever since it was set out up to the time of trial in the year 1848, a period of over fifty years. It was contended for the defendants that there could be no dedication to the public of this right of way, as there was no one capable of dedicating it, inasmuch as the interest in the soil over which the road had been made had been taken out of the lord of the manor by the award. Williams J., who presided at the trial, instructed the jury in the language of Parke B. in *Poole* v. *Huskinson* (4), already quoted, and proceeded to add, that there could not be land without an owner, that the ownership of it must be in somebody, and that it was for the jury to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. This instruction was held to be right by a Court composed of Lord Denman C.J. and Patteson, Wightman, and Erle JJ. The last-named learned judge expressed himself more strongly as to the effect which the jury should give to the

(1) [1904] A. C. 476.
(2) 8 Ad. & E. 99.
(3) (1848) 11 Q. B. 877.
(4) 11 M. & W. 827, at p. 830.

evidence of user than I have been able to find was done by any other learned judge in any of the older authorities. He said: "In this case there was uninterrupted user of the road by the public for about fifty years. I think the learned judge would have been quite justified in telling the jury, that, although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention that the jury '*ought to find*' in favour of the dedication, unless there was some evidence that he did not consent. The direction was much more favourable to the defendant than that would have been."

It will be observed that the words are "*ought to find*," not "*must find*."

The Queen v. *Petrie* (1) was similar to the last case in this, that there was clear and strong evidence of a continuous and open user by the public of the street called Rope Street, the street in question in the case, from the year 1827, when it was laid out, until the year 1836, when the defendants obstructed it.

It was objected, however, that the estate upon which the street was situate was in strict settlement, that the tenant for life was in possession till 1829, when the estate was under a power contained in the settlement sold by his trustees. The first tenant in tail was still a minor. Crowder J., the presiding judge at the trial, told the jury that there was evidence that the east end of Rope Street had been for several years actually used by the public, from which a dedication *might* be *inferred*. "And he asked the jury to say whether they inferred that there was a dedication, and at what time, and by whom." The jury answered that there was a dedication in 1829 by whosoever was then owner in fee. On that finding a verdict was entered for the Crown. On a motion for a new trial it was held by Coleridge, Wightman, Erle, and Crompton JJ. that the question put to the jury was the proper question. And this same learned judge, Erle J., expressed himself thus: "I think the judge was bound to put the question he did. The counsel for the prosecution claimed to rest their case on a certain inference from *the facts: if there was good evidence from which the inference might be drawn, the judge was bound to ask the jury whether they would*

(1) 4 E. & B. 737.

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draw it." These last are precisely the two authorities relied upon by Sir Montague Smith in *Turner* v. *Walsh*. (1) But the judgment of that very learned judge in that case is no authority whatever for the proposition that if the user by the public be proved to be ever so open, lengthy, and continuous, and the presumption of dedication arising therefrom be not rebutted, the jury is at law bound to infer a dedication, or that the judge presiding at the trial is entitled to direct them so to do. In this latter case strong and clear evidence of user was given. It was not rebutted. The presiding judge ruled that user in the Colony (New South Wales) might be relied upon in like manner as it might be in England for the purpose of establishing dedication of a road over Crown lands, as against the Crown, and that the user proved was sufficient to *entitle* the jury to presume dedication by the Crown of the road in question. This was the instruction to the jury of which Sir Montague Smith expressly approved. At p. 641 of the report he says: "Their Lordships have no difficulty in saying that the judge was right in directing the jury that from the user of twenty-one years before the statute, continued since 1861 down to the time of action without any interruption or interference on the part of the Crown, they *might* presume a dedication prior to the statute, and at a time when the Crown had power to dedicate." Again the words are "*might presume*," not "*must presume*." The portion of his judgment on p. 642, in which it is contended he laid down that the presumption of dedication from continuous user was a præsumptio juris, which if not rebutted juries were bound at law to act upon, had reference to a passage in the judgment of Sir William Manning in which that learned judge apparently suggested that the user previous to the Crown Lands Act, 1861, was only inchoate and that its effect was defeated by that statute. The case is, in my view, no authority whatever for the proposition in support of which it was cited.

In *Winterbottom* v. *Lord Derby* (2) user of the way in dispute by the public for a period of seventy years before action was proved. The defence was that during the entire of that period the land the way crossed was under lease, and that the defendant as

(1) 6 App. Cas. 636. (2) (1867) L. R. 2 Ex. 316.

reversioner was not bound by the action of the lessee. The presiding judge told the jury that from long user, going back indeed as far as living memory could go, *they were at liberty, if they pleased, to infer a dedication.*

Cases of this kind might be multiplied. Your Lordships have not been referred to any case, and I, though I have searched somewhat diligently, have not been able to find any case, in which there was even a suggestion that, when the evidence of user is of the strongest kind and is not rebutted, the judge is entitled to direct the jury to find a verdict in favour of dedication. The crucial matter being the existence in the mind of the owner of an intention to dedicate, the inference of that fact, if drawn at all, must be drawn by the judges of fact. The respective functions of the judge and jury in such cases are, in my view, this. It is for the judge in each case to determine, as a matter of law, whether there is any evidence from which the inference of an intention to dedicate can reasonably be drawn; it is for the jury to determine whether it shall be drawn. And if, by adopting such a rule or formula as that contended for, a judge takes upon himself to decide upon the question whether the alleged presumption is rebutted or no, and forces this conclusion of his own upon the tribunal which is to determine issues of fact, either by directing them to find in a certain way, or by setting aside their decision if they find in the contrary way, he, in my view, usurps an authority which in no way belongs to him. The rule of law as to the action of justices in such cases as this is, I think, this, that if it does not appear on the face of their proceeding that they have, as it is said, misdirected themselves, and there was evidence before them upon which reasonable men might act to sustain their findings of fact, their decisions cannot be disturbed.

An order made without any evidence to support it is in truth, in my view, made without jurisdiction, and is therefore invalid at law, but a refusal to find an affirmative in favour of the person on whom the burden of proof lies cannot be so treated. It does not come within either the letter or spirit of the above-mentioned rule. If, in the present case, the justices were not satisfied that the Earl intended to dedicate, they were bound

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to find against dedication. No middle course was open to them.

Mr. Cave referred to par. 131 of Taylor on Evidence, 9th edition. The statement of the law contained in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi even against the Crown. That is a wholly different thing from saying that this presumption is a præsumptio juris, which, if unrebutted, must be acted upon by exclusive judges of fact. This rule, relied upon by the respondents as to the unrebutted presumption of dedication, is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon, but it is, in my opinion, nothing more than that. An order made by such judges, in effect refusing to act upon it in favour of the person on whom the burden of proving dedication lies, cannot therefore, I think, be treated as a nullity, void at law, and made without jurisdiction. The practice of over a century in trials of such questions before juries establishes this.

I am far from saying that if the present case had been tried before a jury they would not have been justified in finding in favour of dedication on the evidence on which the findings of the justices are presumably based. I think they would have been fully justified in so doing, but I am quite unable to come to the conclusion that a finding against the dedication is a conclusion at which no reasonable men could arrive. I go further. I do not think a finding to this latter effect could properly be set aside on the ground that it was against the weight of evidence.

The intention with which Jacob, Earl of Radnor, and his successors permitted the user relied upon being the crucial matter, it is essential to consider the time at which and the circumstances under which the user commenced and subsequently continued. If an owner of enclosed land permits the public for years to traverse on foot a well-marked footway across it, leading from one public thoroughfare to another, without making any effort to prevent them, or indicating in any way that he objects

to the practice, the user would be very strong evidence indeed of his intention to confer on the public the right to use that footway; but if the owner of a moor, or of some waste land over which the public were in the habit of wandering in all directions, were to make an unfenced road across it with similar termini, and by erecting gates or barriers upon the road prevent the passage of horses or carriages over it but took no measures to prevent the public from wandering over it or walking along it as they had theretofore done over the land upon which it has been made, it would appear to me to be pushing a principle to extremes to hold that this omission was not perfectly consistent with the absence of any intention on the owner's part to do anything more than allow the old practice to continue, so far as the changed nature of the surface would permit, without conferring on the public any new right whatever. Heath J. said in the case of *Steel* v. *Houghton* (1), in reference to a claim by the poor of the right to glean in cornfields: "It is the wise policy of the law not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation." The same thought, substituting the word "kindliness" or "good nature" for the word "charity," is expressed by Bowen L.J., as he then was, in *Blount* v. *Layard* (2) (a case about fishery), in the well-known passage of his judgment quoted with approval by Lord Macnaghten in *Simpson* v. *Attorney-General.* (3) It ran thus: "If the case is retried, the jury ought to be most carefully warned (as they were) not to do injustice under the idea that they are vindicating a public right. I think they ought to be solemnly told (as they no doubt will be) that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood." This passage applies forcibly, I think, to the present case. One has only to look at

(1) (1788) 1 H. Bl. 51, at p. 60. (2) [1891] 2 Ch. 681, n., at p. 690.
(3) [1904] A. C. 476, at p. 493.

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the map after reading the findings in paragraph 5 of the special case to realize how great inconvenience, if not annoyance, would have been caused by the fencing of this road in such a way as to prevent any one rambling on the waste land beside it or from crossing over it to the beach, or gaining access to it, and how difficult, if not impossible, it would have been, while the road remained unfenced, to have prevented those wanderers from walking along it from end to end.

Much reliance was placed upon the fact that while a toll gate and barriers were erected upon this road to prevent the passage of wheeled traffic along it, no barriers were erected to prevent the passage along it of passengers on foot, that, on the contrary, room was left at each side of these obstructions for foot passengers to pass. But no barrier—while the public were permitted to wander over the waste land and the road remained unfenced—could have been effective for that purpose; because any one could by deviating on to the waste land at either side of the road have outflanked the barrier. Exclusion from the waste land would possibly have been an effective protection to the owner's rights, but it would have been a churlish and unkindly act, hurtful, probably, moreover to the development of Folkestone as a seaside resort.

It has been found that there was no evidence of any road or defined footway having been made upon this land before the year 1827, and there is no finding that such a footway existed over it leading from one public thoroughfare to another before that date, or that any precaution was taken to prevent people from wandering where they would over the surface of the waste land. It was, however, found that since 1836 foot passengers used the whole width of the road as a passage, and had traversed the banks at its sides where practicable: that the road was not absolutely necessary for the accommodation of any persons other than those who occupied the houses since erected abutting upon it, their servants, tradespeople, and visitors; that such repairs as were effected upon it down to 1851 were executed at the expense of Lord Radnor and his successors, but that it was never properly repaired till the year 1836; and never formally dedicated as a public highway according to the provisions of the 23rd section

of the Highway Act, 1835. The correctness of this last finding is admitted.

It was not disputed in argument that for all purposes, other than that of the passage of persons on foot, this road was a private road; nor was it disputed that Jacob, Earl of Radnor, was in the year 1827, when this road was made, only tenant for life of his estate, and as such could not at common law have dedicated to the public any right of way over it. Neither was it disputed that for many years from and after that date, 1827, the estate was settled in strict settlement, but the appellants put in evidence before the justices a private Act of Parliament of June, 1825, passed to enable building leases to be granted of part of the settled estates of the Earl. The 1st section empowers him to grant building leases with power to the lessees to appropriate any portion of the demised premises as and for streets, passages, or ways for the more convenient enjoyment of such houses as might be built. And the 5th section, which is the important section, empowers the Earl to "allot and set out" a component part of the pieces or plots of ground described in the schedule annexed to the Act for "public squares, roads, streets, ways, avenues, or otherwise for the use and convenience of the houses and other public buildings to be erected upon the said pieces or plots of ground or any part or parcel thereof as aforesaid." The waste land below the cliff was included in this schedule. If the Earl dedicated this road as a footway to the public he could only do so under the provisions of this section.

A lengthened argument was addressed to your Lordships' House on the construction of the section. It is obvious that its framers considered that a street, road, or way, though public, might yet be for the convenience of the occupiers of the houses to be built; but it was contended that this particular Sandgate Road was "not allotted or set out" for the purpose of a public footpath, but merely as and for a private roadway for horses and carriages to traverse. I think it would, on the authorities I have cited, have been competent for the Earl to have "allotted and set out," under the provisions of this section, a road to serve the double purpose of a public footpath and a private road for the passage of horses and carriages, and that it would have

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been competent for any jury who might have tried the case, and for the justices who actually tried it, to have presumed from long-continued user that he intended to do this, but I think it would have been equally competent for such a jury, and was competent for the justices, having regard to all the facts, notwithstanding the evidence of user, to have found that the Earl never intended to do anything so improbable. One could, I think, understand his making, for the development of his estates, a road public for all purposes leading from one public thoroughfare to another, or making a private road (for which he did not require statutory powers), leaving the public to wander over it as they had formerly wandered on the ground it covered, and not churlishly depriving them of that enjoyment, without intending to confer any new public right. Both of these courses would have been reasonable enough. I fail to see on what ground it could be held that no reasonable men could find he adopted the latter.

Sir Robert Finlay relied much on the fact set out in paragraph 6 of the case. He urged that if either the then Earl or the corporation believed that any public footway then existed over this road, it would necessarily have been mentioned in this negotiation. No allusion appears to have been made to its existence. I concur with him in thinking that the conduct of the parties in this respect is very significant. On the whole I am of opinion that the appeal should be allowed and the judgment of the King's Bench Division restored, on the ground, in addition to that already mentioned, that it would have been competent for a jury, had the case been tried by a jury, to have, on proof of the facts found, returned a verdict either in favour of dedication or against it, and that neither verdict could have been disturbed. I further think that if the findings in the case stated were treated as a special verdict found by a jury the respondents would not have been entitled to have a judgment entered for them, and I am, therefore, unable to discover any ground on which the conclusion of this Bench of justices should be disturbed where a jury's determination would not have been disturbed. It is hardly necessary to point out that in the case of *The Board of Works for Greenwich* v. *Maudslay* (1) the Court had power to draw inferences of fact.

(1) L. R. 5 Q. B. 397.

LORD DUNEDIN. (1) My Lords, in this case the only question before us is whether there was evidence before the justices which reasonably entitled them to come to the conclusion which they embodied in their finding, "That there was, in fact, no dedication of the road in question as a highway prior to March 10, 1836," as amplified by the further finding "that there was no dedication of the road in question as a highway for foot passengers before the year 1836."

The reason of the findings being in two branches is to be found in this. Upon the first finding coming before the Divisional Court, and on consideration of the case as stated, that Court held that it was not certain whether the justices had considered the whole possibilities of the circumstances, or, in other words, that the first finding as it stood might mean that the road had not been dedicated as a carriage road, leaving undetermined the fact as to whether it had or had not been dedicated as a foot road. So they sent it back to the justices to state precisely whether they had found the latter matter, and if they had found as regards the foot road also against the dedication, their judgment was to stand. Accordingly the justices, on remit, added the finding second quoted, and their judgment stood.

Now, it is true that the actual judgment which was allowed to stand was expressed thus (after making the finding first quoted, and adding "that since 1836 there has been no dedication as prescribed by s. 23 of the Highway Act, 1835"): "We therefore decided that the road in question is not, nor is any part thereof, a highway repairable by the inhabitants at large," and the question was put, "Whether upon the above statement of facts we came to a correct determination in point of law." Nevertheless, however the question is framed, the Divisional Court—and necessarily the Court of Appeal in their turn reviewing the judgment of the Divisional Court—has only a right to review law, and so far as a judgment depends on facts the only question of law arising thereon is, Was the evidence reasonably sufficient to justify the finding?

I find this very clearly expressed by Channell J. in the case of *Rishton* v. *Haslingden* [*Corporation* (2), where he says, "The

(1) Read by Lord Shaw of Dunfermline. (2) [1898] 1 Q. B. at p. 301.

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magistrates ask, 'Were we justified in finding?' It is contended that as the magistrates can only state a case upon a point of law, and must themselves decide a question of fact, this question means, 'Was there any evidence upon which we could find as we did?' And this we think is so."

Such was also clearly the view of the Divisional Court in this case, for they allowed the decision to stand. That necessarily meant that they considered the question one for the justices to determine, and that whichever way they determined it there was some evidence on which the judgment could be supported. As Hamilton J.—as he then was—puts it at the close of his judgment: "As the matter is of one of fact, and there is some evidence for the justices on it, it must go back for their determination."

When the case came before the Court of Appeal, two of the learned judges took the view that there was no evidence upon which the finding of the justices could be supported; Fletcher Moulton L.J. dissented. My Lords, I am not going to recite the judgments of the majority, but I hope I do them no injustice when I say that they seem to me to be rested on this view. They fasten upon certain of the series of separate conclusions in fact which the justices set out in the case, and which run: "(H) . . . . But there was evidence before us, and we found that from the year 1831 the road was to some extent used by inhabitants of Folkestone and Sandgate other than the said lessees, &c., for business and other purposes." "(J) That spaces are, and have been, since a period antecedent to 1836, left on either side of the toll gate for foot passengers." "(P) That prior to 1836 the road in question was never kept in proper repair, but was open for foot passengers without interruption, and has so continued to the present time." "(Q) That there was no evidence before us of any made footpath on the road before 1836, but we found that foot passengers used the whole width of the road, and the banks by the sides of the road (where practicable) without let or hindrance."

These findings, say they, amount to a finding of user by the public. User by the public raises a presumption of dedication, and in the other facts found by the justices (which exhaust

the letters of the alphabet from A to T, exclusive of the letters above quoted) there is nothing sufficient to rebut the presumption.

With deference to the learned judges, I do not think that is the proper way to approach the question, and its defect, to my mind, consists in regarding "user" as an inflexible term, which, if found to apply, can lead to only one legal result. User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication.

I can make my meaning clear by illustration. If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than this, that the evidence points all one way. Hundreds of highways are in this position. But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. But from that house there leads another avenue to the north which connects with a public road different from that from which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up the one avenue and down the other—perhaps without actually calling at the house—raise a presumption that the landholder had dedicated

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his private avenues as highways? The user would be naturally ascribed to good nature and toleration.

Now, what were the surrounding circumstances in this case? The origin of the road was known. It was not a case where the mere user discovered the existence of the road. It was made as an estate work, and it was in its origin and up to the critical date indubitably not only labelled private but kept private, for the greater uses for which its construction was designed, namely, horse and carriage traffic. It was only repaired by the proprietor, never by the parish, and a transaction was entered into at a later date (1852) which shewed on the face of it that in the view of the proprietor and of the Commissioners of Folkestone at that time the road was a private road. Further than that, there was the light to be got from the legal position of the proprietor. He was admittedly a limited owner, and it is conceded that a limited owner cannot dedicate. But before the road was made his disability was removed by an Act of Paliament—provided always that he acted in the way that the Act of Parliament directed. In other words, looking at the terms of s. 5 of the private Act, the Earl of Radnor could only dedicate if he "set out ground for public squares, roads, ways, or otherwise." He admittedly did not set out this as a public carriage-way. Did he set it out as a public way for foot passengers?

I must here pause to say that the strenuous criticism which was directed in the argument against the judgment of Fletcher Moulton L.J. in the Court of Appeal to my mind missed its mark. It was argued that that learned judge insisted that unless it could be shewn that the Earl of Radnor formally "set out" this particular highway as for passengers, the case for dedication must fail, and it was added that, upon the view of omnia præsumuntur rite et solemniter acta, the direct evidence of such formal dedication after such a lapse of time could not be insisted on. I do not think that is at all a fair view of the learned judge's opinion. All I think he meant and said was this: That inasmuch as to be valid at all the dedication must have had its origin in a setting out under s. 5, you were bound to consider, under the whole circumstances of the case, whether such a dedication as is here sought to be shewn was a thing to

be inferred as a likely thing for the estate owner to do. In the long run it all comes to this, which is the more probable alternative? Did the Earl of Radnor lay out this road as private and mean to keep it private as of right, although he did not take any active steps to prevent foot passengers going over it any more than he took active steps to prevent them straying over the waste surrounding ground, or did he when laying out a private carriage road, which he meant to and did keep private, at the same time dedicate to the public a footway on the top of the said private carriage-way? The circumstances which I have detailed may be said to point to the former, those included in the lettered findings above quoted may be said to point to the latter.

My Lords, if I had been one of the justices, I say frankly I should have come to the same conclusion as they did. In that I may be wrong. I cannot be sure I am right, for I see that several learned judges, who are just as competent to weigh evidence as I am, if they had been in that position, would have come to a different conclusion. But the question is not whether I am wrong or right, the question is whether there is any evidence to support such a conclusion. I am willing not to be dogmatic in saying that my conclusion is the right one, but I am not equal to such a height of modesty and altruism as to say that the conclusion which I have reached in common with the justices and Fletcher Moulton L.J. is a conclusion to which, on the evidence, no reasonable man ought to have come. It follows that in my opinion this appeal must prevail.

Earl Loreburn.(1) My Lords, in this appeal the question of substance is whether upon the facts found by the justices they were justified in coming to the conclusion that there was no dedication of a certain road near Folkestone before 1836. Treating these findings in the special case as the evidence upon which the conclusion of the justices was based, is there any evidence to support that conclusion? If I relied upon my own unaided judgment I should assent to the order of the Court of Appeal, because I have not myself been

(1) Read by Lord Atkinson.

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able to see any such evidence. But I know that Fletcher Moulton L.J. and your Lordships think otherwise, and in those circumstances I feel that I cannot insist upon a view which would import that there was no evidence upon which a reasonable man could act. I take it, therefore, that there is such evidence, and if so, then the conclusion of the justices cannot be lawfully disturbed.

I desire to say only a few words upon the law of the case, which was discussed at the Bar. I believe that the doctrine enunciated in the Privy Council in *Turner* v. *Walsh* (1) has been uniformly accepted; that dedication may be and, indeed, ought to be presumed in the absence of anything to rebut the presumption from long-continued user of a way by the public. Two things have to be made good, that the user has been sufficient in its duration and character, and that the presumption then arising has not been rebutted. The two questions are usually, or at all events often, put to the jury in a composite form. For example, they are told that if they think the user is sufficient, dedication ought to be presumed, unless they think it is rebutted by the evidence. In that or in any other case where there is not any evidence to support a verdict, it may be set aside, and the proper judgment may be entered against the party whose case has nothing to support it. As for the presumption, I do not think it makes much difference whether it be called a presumption of law or fact, though I think it is the former.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, February 6, 1914.

Solicitors for appellants: *Holt Beever & Crowdy, for A. F. Kidson, Folkestone.*

Solicitors for respondents: *White, Borrett & Black, for A. D. & L. J. D. Brockman, Folkestone.*

(1) 6 App. Cas. 636.

[HOUSE OF LORDS.]

GUARDIANS OF THE POOR OF THE PARISH OF BRISTOL . . . . . } APPELLANTS;

AND

BRISTOL WATERWORKS COMPANY . . RESPONDENTS.

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1914
Feb. 6.

Water Company — Supply for Domestic Purposes — Workhouse — "Private dwelling house" — Bristol Waterworks Act, 1862 (25 & 26 *Vict. c. xxx.*), *s.* 68 — *Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 53, 68.

A water company, by s. 68 of its special Act (which incorporated the Waterworks Clauses Act, 1847), was required at the request of the owner or occupier to furnish to every occupier of "a private dwelling house or part of a private dwelling house" within the limits therein defined a supply of water for the domestic use of such occupier at water rents based on the annual value of the premises as therein specified. By s. 53 of the Waterworks Clauses Act, 1847, "every owner and occupier of any dwelling house or part of a dwelling house within the limits of the special Act shall when he has" (inter alia) "paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

The owners and occupiers of certain workhouses within the limits defined by s. 68 of the company's special Act claimed the right to a supply of water to their workhouses for domestic purposes at the rents prescribed by that section:—

Held, upon the construction of s. 68 of the special Act in conjunction with s. 53 of the Waterworks Clauses Act, 1847, that the right to demand a supply of water for domestic purposes was limited to private dwelling-houses, and that the claim failed.

Decision of the Court of Appeal [1912] 1 Ch. 846 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Eve J. (2)

The respondents were a company incorporated by the Bristol Waterworks Act, 1846 (9 & 10 Vict. c. ccxxii.), which was repealed and partially re-enacted by the Bristol Waterworks Act, 1862 (25 & 26 Vict. c. xxx.), and were authorized to supply water to the

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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inhabitants of Bristol under (among other Acts) the Act of 1862 and the Bristol Waterworks Amendment Act, 1865 (28 Vict. c. xxvi.).

The Bristol Waterworks Act, 1862, s. 4, incorporated the Waterworks Clauses Act, 1847 (1) "(except where otherwise specially provided by this Act)."

Sect. 68 provided as follows: "The company shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling house or part of a private dwelling house, in any public street or road within the limits of this Act in which, or within one hundred yards of which, any main pipe of the company shall be laid, a sufficient supply of water for the domestic use of every such occupier" at annual rents or prices (thereinafter called water rents) based on the annual rackrent or value of the premises as therein specified.

Sect. 73 empowered the company to supply water for other than domestic purposes upon such terms and conditions as should be agreed upon between the company and the persons desiring such supply, but not "so as to prejudice or diminish the full and adequate quantity required for domestic purposes."

The Bristol Waterworks Amendment Act, 1865 (s. 2), incorporated the Waterworks Clauses Act, 1847, without any reservation, and s. 26 entitled the company, on the completion of certain waterworks therein mentioned, "to charge and receive in addition to the water rents authorized by the Act of 1862 any sums not exceeding one per cent. per annum on the annual rackrent or value

(1) The most material provisions of the Waterworks Clauses Act, 1847, were as follows:—

Sect. 53: "Every owner and occupier of any dwelling house or part of a dwelling house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

Sect. 68: "The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

of every dwelling house or part of a dwelling house supplied with water by the company within the limits of the Act of 1862."

The appellants, as the guardians of the poor for the parish of Bristol, were the owners and occupiers of the following workhouses and homes for the reception of pauper children, namely, Eastville Workhouse and master's house thereto, Stapleton Workhouse and casual wards thereat, the Children's Homes situate at Fishponds, and Southmead Workhouse; and also of St. Peter's Hospital, which at the present time was used solely for offices and committee rooms, the only persons residing on the premises being the caretaker and his wife and a porter.

All these premises were within the limits mentioned in s. 68 of the respondent company's Act of 1862.

For many years past the appellants had obtained from the respondent company a supply of water for the use of the officers and inmates of the premises for both domestic and non-domestic purposes at a uniform rate of 1*s.* per 1000 gallons.

In September, 1910, the appellants requested the respondents to furnish them with a sufficient supply of water for the domestic use of the officers and inmates of these premises, to be paid for at water rents not exceeding the water rents contained in s. 68 of the Act of 1862, but the respondents refused this request.

Thereupon the appellants commenced an action against the respondents for a declaration that they were entitled to be furnished by the respondents, in accordance with the Act of 1862 and the Acts incorporated therewith, with a proper and sufficient supply of water (separate from any supply by meter for non-domestic purposes) for domestic purposes to the premises in question, and that the respondents were bound to supply such water at the water rents prescribed by s. 68 of the Act of 1862.

Eve J. held that the Waterworks Clauses Act, 1847, must be read subject to the provisions of the special Act of 1862; that by s. 68 of the special Act the obligation of the respondents to supply water for domestic purposes was limited to private dwelling-houses; and that the premises in question were not private dwelling-houses within the meaning of that section. He therefore dismissed the action.

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This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., Fletcher Moulton L.J. dissenting).

1913. Dec. 2, 4. *Danckwerts, K.C.*, and *E. H. C. Wethered*, for the appellants. The owners and occupiers of dwelling-houses, whether private dwelling-houses or not, within the limits of the respondent company's special Acts are entitled as of right to a supply of water for domestic purposes. The Bristol Water-works Acts of 1862 and 1865 incorporate the Waterworks Clauses Act, 1847, which deals only with water supplied to dwelling-houses for domestic purposes, as distinguished from water supplied for non-domestic purposes, and makes such supply compulsory. The object of that Act, as stated in the preamble, was to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction of waterworks for supplying towns with water and to secure uniformity in the provisions themselves, and the appellants' contention gives effect to that object. Sect. 35 requires the company to keep a sufficient force of water for the whole of the domestic supply, and s. 53 says that every owner or occupier of any dwelling-house within the limits of the special Act, upon laying the necessary communication pipes and paying or tendering the water rate payable, is entitled to a supply for domestic purposes. Sect. 68 says that the water rates are to be payable according to the annual value of the premises supplied, but does not state the amount of the rate. That is left to the special Act. The special Act of 1862 incorporates the Waterworks Clauses Act, 1847, except as therein otherwise provided. Sect. 68 of the special Act is relied on by the respondents as limiting their obligation to supply water for domestic purposes to private dwelling-houses within the limits therein defined and as excluding pro tanto the provisions of ss. 35 and 53 of the general Act. The appellants contend that s. 68 affects only the rates to be charged in respect of a particular class of house and does not affect the general obligations imposed by the Act of 1847, and that the rates mentioned in s. 68 of the special Act must be read into ss. 53 and 68 of the general Act. The other sections

of the Act of 1862 indicate that "domestic purposes" were not intended to be limited to the special case mentioned in s. 68. [They referred to ss. 71, 73, and 75.] But assuming that s. 68 of the Act of 1862 excludes the obligations imposed by the Act of 1847 so far as regards dwelling-houses other than private dwelling-houses, those obligations are revived by the special Act of 1865. That Act incorporates the Waterworks Clauses Act, 1847, without any qualification, and s. 26 of the special Act empowers the respondents to charge, in addition to the water rents authorized by s. 68 of the Act of 1862, one per cent. per annum on the annual value of "any dwelling house," not "any private dwelling house," supplied by them with water within the limits of the Act of 1862. In that section the term "water rents" is used generically and not as relating to individual rents. Upon the true construction of those Acts, read in conjunction with the Waterworks Clauses Act, 1847, the appellants are entitled to a supply of water for domestic purposes at the rates prescribed by s. 68 of the Act of 1862 and s. 26 of the Act of 1865, or, if those rates are inapplicable, then, as Fletcher Moulton L.J. suggested, without any payment. Sect. 68 of the Act of 1862 has been misdrafted, the word "private" ought to have been omitted. Several sections of the special Act of 1846, namely, ss. 63, 73, 76, 77, and 79, have been omitted by the draftsman, apparently per incuriam, from the Act of 1862. Now the language of a special Act is taken to be the language of the promoters, and if the promoters in this case have failed to provide any rate applicable to dwelling-houses which are not private dwelling-houses they must take the consequences. Private Acts are to be construed strictly against the promoters and liberally in favour of the public, for the promoters are asking Parliament to confer very great privileges upon them in consideration of certain advantages to be rendered to the public: *Parker* v. *Great Western Ry. Co.* (1); *Stockton and Darlington Ry. Co.* v. *Barrett* (2); *Metropolitan Water Board* v. *New River Co.* (3) Applying the principle of those cases to the facts of the present case, the promoters are

(1) (1844) 7 Scott, N. R. 835, at p. 870.

(2) (1844) 11 Cl. & F. 590, at p. 607.

(3) (1904) 20 Times L. R. 687.

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not entitled to hold the public to the letter of this nonsensical clause (s. 68) and say that it amounts to an implied repeal pro tanto of s. 53 of the Act of 1847. Further, if s. 68 of the special Act is to be read literally the respondents have no power at all to supply water by contract for domestic purposes. The language of s. 73 is inconsistent with the existence of any such power. The respondents claim that power as incidental to the purposes of their undertaking, but the true principle is that when a company has been created for public purposes, such as a railway company or a water company, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication: *Attorney-General* v. *Great Eastern Ry. Co.* (1); *Attorney-General* v. *London County Council.* (2) There is nothing in the language of the respondents' special Acts to justify the implication of any such power as they claim; if any implication is to be made from the language it is the contrary. [They also referred to *Colley's Patents* v. *Metropolitan Water Board.* (3)]

Upjohn, K.C., and *D. M. Kerly*, for the respondents. The function of the Waterworks Clauses Act, 1847, was to bring into one general Act a number of clauses usually contained in special Acts, while leaving to the special Act the power of saying to what extent the general Act should be incorporated. The special Act is always to govern. Sect. 1 of the general Act contemplates the variation of its clauses by the special Act, and affords no justification for the view that the former Act is dealing with any question of public policy. Qua compulsory supply for domestic purposes, the general Act is applicable to the special Act of 1862 only to the extent of private dwelling-houses. Sect. 68 of the special Act and s. 53 of the general Act are in pari materia, and putting those two clauses side by side no one can fail to see that a variation is introduced by the special Act and that they cannot stand together. It is not necessary that the special Act should say "by way of express variation of the Act of 1847." Sect. 68 of the Act of 1862 gives a complete

(1) (1880) 5 App. Cas. 473, at p. 486.

(2) [1901] 1 Ch. 781, at p. 797; affirmed [1902] A. C. 165.

(3) [1912] A. C. 24.

statement of the obligation of the respondents as regards domestic supply, and then it provides for their remuneration. The Act of 1847 did not contemplate the supply of water for domestic purposes without payment. Sect. 53 of that Act shews that there must be a water rate for every house supplied. Sect. 68 of the general Act does not assist in applying s. 53 because it does not specify what the rate is. There being then no rate fixed by either Act except in the case of a private dwelling-house, it follows that s. 53 cannot be applied except to a private dwelling-house, i.e., it is only incorporated so far as regards a private dwelling-house. The Clauses Act gives no rights in itself, and where there is an inconsistency between the general provisions of the Clauses Act and the particular provisions of the Special Act the latter are to prevail: *Cooke, Sons & Co.* v. *New River Co.* (1) The general Act imposes correlative obligations on the company and on the consumer—on the company to supply water to the consumer for domestic purposes, and on the consumer to pay for that supply. There is no suggestion in any of the provisions of the Act of an obligation on the company to provide a gratuitous supply. The Act contemplates throughout a supply on terms of payment to be fixed by the special Act. Upon the construction of the respondent company's special Acts it has ample power to supply water to anybody within its district for every purpose and it is subject to two obligations—one to supply water to private dwelling-houses for domestic purposes, and the other to supply water on the quays for shipping; and in each case remuneration is provided. There was no blunder in s. 68 of the Act of 1862, which was simply a copy of s. 86 of the special Act of 1846, under which the respondent company was incorporated. Sect. 73 of the Act of 1862 affords no difficulty. Upon the true construction of that section it gives power to the company to supply water by contract for any purpose subject to not interfering with the domestic supply to private houses. As regards the Act of 1865, it is a rule of law that one private Act cannot repeal another except by express enactment: *Trustees of Birkenhead Docks* v. *Birkenhead Dock Co.* (2); *Purnell* v. *Wolverhampton New*

(1) (1889) 14 App. Cas. 698. at p. 704. (2) (1853) 23 L. J. (Ch.) 457.

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Waterworks Co. (1) Therefore it must appear quite clearly that the scope of the Act of 1862 has been altered by the Act of 1865. Having regard to the preamble of the Act of 1865, and to the definition of " water rents " in s. 4, it is clear that the intention of s. 26 was merely to provide for an increase of the water rents provided by s. 68 of the Act of 1862 in consideration of the additional works to be executed under the authority of the later Act. It was not intended to make the enormous alteration in the obligation of the company suggested by the appellants. The mere incorporation of the Act of 1847 by the Act of 1865 without any limitation cannot produce such a result, for s. 1 of the Clauses Act itself provides that its clauses shall apply " save so far as they shall be expressly varied or excepted " by the special Act. That is to the same effect as s. 4 of the special Act of 1862, and no further limitation was required. The Act of 1865 therefore throws no light whatever on the obligation of the company to supply water for domestic purposes.

E. H. C. Wethered in reply. If no rate is provided by the special Act it is submitted that upon the true construction of s. 53 of the general Act the appellants are entitled to a domestic supply on payment of a reasonable rate.

The House took time for consideration.

1914. Feb. 6. EARL LOREBURN. My Lords, a good many points were raised in the argument of this appeal upon which I need not dwell in view of the opinions expressed in the Court of Appeal. There is only one point upon which I have felt difficulty.

The Waterworks Clauses Act contains a number of provisions of general utility. Among others, is clause 53, entitling the owner and occupier of any dwelling-house within the limits of " the special Act " to have a supply of water for domestic purposes when he has " paid or tendered the water rate payable in respect thereof according to the provisions of this and the special Act." These clauses do not apply to any waterworks unless they are incorporated by the special Act under which the actual supply

(1) (1861) 10 C. B. (N.S.) 576, at p. 591.

of the locality is regulated, and the special Act may, of course, qualify their application.

Now, the question here is whether a workhouse in Bristol is entitled to a supply of water for domestic purposes, and, if so, on what terms as to water rate. I therefore turn to the Bristol Waterworks Acts. The Act of 1862, s. 68, says that the occupier of "a private dwelling house" is entitled to a supply of water "for the domestic use of every such occupier" at certain rates therein specified. But a workhouse is not a private dwelling-house. And, without entering upon all the arguments by which it was sought to call in aid other sections of the "special" Acts relating to the Bristol Waterworks, it is enough to say that I agree with the Court of Appeal in thinking that there is no section in them which imposes upon the waterworks company the duty of supplying dwelling-houses which are not "private" with water for domestic purposes. It is quite true that in construing private Acts the rule is to interpret them strictly against the promoters, and liberally in favour of the public; but a Court is not at liberty to make laws, however strongly it may feel that Parliament has overlooked some necessary provision, or even has been overreached by the promoters of a private Bill.

In the present case, therefore, the special Acts do not confer upon the occupiers of this workhouse any right to have a supply of water for their domestic use, though I have no doubt that they may lawfully be so supplied if the water company chooses to supply them. If it does so choose it can make its own terms. The ratepayers are at the mercy of the waterworks company so far as the special Acts which that company or its predecessors procured are concerned, because while the special Acts fix a rate for the supply of private dwelling-houses, they do not fix a rate for dwelling-houses which are not private.

Now, it is to my mind a very serious matter that in a great city like Bristol the waterworks company, which has practically a monopoly within its own limits, should be free to charge what it pleases or to refuse a supply for necessary domestic consumption except to a "private dwelling house or part of a private dwelling house." And I have been very anxious to escape from that conclusion if it can be done without departing from the line

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of judicial duty. The only plausible means of escape from what, in view of all this legislation, was obviously a draftsman's blunder many years ago is as follows.

The Bristol Acts incorporate the Waterworks Clauses Act of 1847. Now, s. 53 of the Clauses Act does entitle the owner and occupier of any dwelling-house (not merely any "private" dwelling-house) within the limits of the special Act to this supply, if he has paid or tendered "the water rate payable in respect thereof according to the provisions of this and the special Act." And further, by s. 68 of the Clauses Act, "the water rates, except as hereinafter and in the special Act mentioned, shall be paid by and recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices." Here we have, it was suggested, a duty to supply all dwelling-houses, and, as to payment, as the special Acts are silent in regard to the rate, the Court ought to say there is to be a payment or tender of a reasonable sum, as in the case of contracts a quantum meruit is implied in default of a sum being specified. Now it is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. I ask myself, did Parliament intend that the payment or tender should be a reasonable sum to be fixed if need be by the Courts? For what the justices are to determine is only the value of the tenement, not the rate or amount to be paid. I have no ground for believing that Parliament meant this curious method. I do not believe it did, and to insert such a provision would be simply making, not interpreting, the law. After all, it is not our function to repair the blunders that are to be found in legislation. They must be corrected by the Legislature.

I am therefore of opinion that the order appealed from should be affirmed. It is for Parliament to say whether it will in its wisdom interfere.

LORD ATKINSON. My Lords, I concur in the judgment that has just been delivered by my noble and learned friend on the woolsack.

LORD PARKER OF WADDINGTON. (1) My Lords, the object of the Waterworks Clauses Act, 1847, sometimes referred to as the general Act, was (as appears from the preamble) to avoid the necessity of repeating in Acts of Parliament which authorize the construction of waterworks for supplying towns with water (sometimes referred to as special Acts) certain provisions usually inserted in such Acts and to ensure greater uniformity in the provisions themselves. The general Act has no application unless and until it be incorporated in some special Act. If so incorporated, all its clauses save so far as they are expressly varied or excepted by the special Act are to be and form part of such last-mentioned Act and to be construed therewith as forming one Act. It follows that the meaning and effect to be given in each case to the clauses of the general Act, even though there be no express variation or exception, must depend, to some extent at any rate, on the provisions of the special Act, and cannot be determined without reference to such provisions.

If the scheme of the general Act be considered, it appears reasonably clear that the right of any one to demand a supply of water for domestic use was regarded as involving an obligation to pay for such supply a water rate calculated upon the annual value of the premises to which the supply was given, the actual rate being left to be fixed by the special Act. Thus in s. 35 the undertakers are to keep in their pipes a supply of water sufficient for the domestic use of the inhabitants entitled to demand a supply and willing to pay water rate for the same and are to cause water to be brought to every part of the district within the limits of the special Act whereunto they shall be required by so many owners or occupiers of houses in that part of the district as that the aggregate water rate payable by them annually at the rates mentioned in the special Act shall not be less than one-tenth of the expense of so doing. Again,

(1) Read by Lord Atkinson.

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under s. 44 the obligation of the undertakers to lay communication pipes for the supply of water to such houses as therein specified is conditional on the tender of the proportion of water rate in respect of such houses payable in advance, and under s. 48 the right of the owner or occupier of a house to lay communication pipes is conditional on a similar tender. Again, by s. 53 it is provided that every owner or occupier of a dwelling-house or part of a dwelling-house within the limits of the special Act shall when he shall have laid such communication pipes and shall have paid or tendered the water rate payable in respect thereof according to the provisions of the general Act and the special Act be entitled to a supply of water for his domestic purposes. It was suggested that all these sections ought to be read as referring to the payment or tender of the water rate "if any" payable in respect of the premises referred to, but, so read, the sections would obviously be contemplating the possibility of a right to a supply of water for domestic purposes free of charge, a very unusual if not an unprecedented thing in the history of legislation with regard to water companies. In view of the fact that the general Act professes to contain only those clauses usually inserted in Acts which authorize the construction of waterworks, it would, in my opinion, be wrong to read the sections as contemplating anything of this nature. No doubt, however, the sections to which I have referred do contemplate that the owner or occupier of every dwelling-house or part of a dwelling-house within the limits of supply will be entitled to demand a supply of water on the terms of paying a water rate on the annual value of the property, the actual rate being left to be determined by the special Act.

My Lords, the difficulty in this case arises from the fact that the special Act of 1862 while incorporating the general Act without any express variation or exception so far as relates to the sections to which I have referred provides in s. 68 that the company shall at the request of the owner or occupier furnish to every occupier of a private dwelling-house or part of a private dwelling-house in any public street or road within the limits of the Act in which or within one hundred yards of which any main of the company shall be laid a sufficient supply of water for the

domestic use of such occupier at annual rents or prices not exceeding the rents or prices therein particularly mentioned, but does not provide for the payment of any water rate in respect of any premises which are not a private dwelling-house or part of a private dwelling-house. It was suggested by counsel for the appellants that this difficulty might be overcome by treating the rates prescribed by the 68th section as payable in respect of all dwelling-houses or parts of dwelling-houses or by treating the 53rd section of the general Act as itself imposing a water rate of reasonable amount in cases where the special Act does not provide for the amount of such water rate. I cannot accept either suggestion. If the former were adopted, your Lordships would in effect be striking out the word "private" altogether from the 68th section and would be imposing on the occupiers of dwelling-houses or parts of dwelling-houses not falling within the 68th section a liability which is evidently contemplated as falling only on the occupiers of private dwelling-houses or parts of private dwelling-houses. If the latter suggestion were adopted, litigation might ensue in every case in which no agreement could be come to as to what constituted a water rate of reasonable amount. It appears to me that in construing the Act of 1862 there are in effect only two alternatives open to your Lordships.

Either the 53rd section of the general Act when read into and construed with the special Act must be treated as controlled by the 68th section of the special Act, in which case notwithstanding the generality of the words the only persons entitled to demand a supply of water for domestic use would be the persons referred to in such 68th section. Or else the 53rd section of the general Act must be treated as the governing section, in which case the occupier of every dwelling-house or part of a dwelling-house not falling within the 68th section would be entitled to a supply of water for domestic use free of any charge whatever. The latter alternative involves the 53rd section of the general Act being read as if the words "if any" were inserted after the words "water rate," and, for the reasons I have already mentioned, I doubt whether this be permissible. Further, to provide that the occupiers of all

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dwelling-houses or parts of dwelling-houses, not being in a public street or road, or not being private dwelling-houses or parts of private dwelling-houses, should have a free supply for domestic purposes would be a new and strange departure in legislation, and, having regard to the wide meaning which is now attached to the word "dwelling-house" in Acts relating to the supply of water, might have far-reaching consequences.

I think your Lordships will be more likely to give effect to what was the real intention of the Legislature by adopting the first alternative. The 68th clause of the special Act would be the subject of consideration and scrutiny in committee, but the clauses of a general Act incorporated by reference would not. It is more likely, therefore, that the 68th section was intended to be the governing section. If the draftsman of the Act has blundered, it is, I think, more likely that the blunder consisted in omitting to notice and provide for the inconsistency between s. 53 of the general Act and s. 68, than in omitting to provide for the company being paid for a supply of water which it was intended it should be bound to give. On the other hand, those who, in the parliamentary bargain embodied in the Act, represented the public interest must have been perfectly well aware that the general Act did not contemplate any domestic supply being given without payment, and that the special Act did not provide for any such payment, except in the case of private dwelling-houses or parts of private dwelling-houses. No doubt the general rule is that, in Acts of this nature, provisions for the public benefit are to be interpreted liberally, but the 53rd section of the general Act is for the benefit of persons on whom it is assumed that the special Act will impose an obligation, and where the special Act imposes this obligation on a more limited class, I see nothing inconsistent with the general rule in construing the 53rd section, when read with and as part of the special Act, as intended to benefit the more limited class only. Further, if the Act be so read, it preserves the state of things which existed under the special Act of 1846, and this may very well have been the true intention.

It is argued that if the special Act of 1862 be thus construed,

the company, having no express power in that behalf, could not supply water for domestic purposes by agreement with the owners or occupiers of dwelling-houses not within the 68th section. I do not think that this argument can prevail. The company was incorporated and exists for the express purpose of supplying water to the inhabitants of their district for (inter alia) domestic purposes, and I do not think that s. 68, which compels them to grant a supply for domestic use to certain persons at specified rates, or s. 73, which gives them power to supply water by agreement for other than domestic purposes (provided that the supply for domestic purposes is not thereby prejudiced), can be construed as limiting the purpose for which the company exists, or the powers necessarily implied if such purpose is to be effectuated.

It was also argued that s. 26 of the Act of 1865, which again incorporates the general Act of 1847, obviates all difficulty in the matter by imposing a water rate in respect of dwelling-houses or parts of dwelling-houses not within s. 68 of the Act of 1862. I have come to the conclusion that the meaning and effect of this 26th section is to enable the company, in a certain event, to charge an increased water rate in respect of premises on which water rate was payable under the earlier Act, and not to make premises on which no such rate was payable under the earlier Act subject to water rate. The words "increased rents" in s. 29 seem conclusive in this respect.

Lastly, I cannot find anything in the later special Acts which has any real bearing on the question your Lordships have to decide.

In my opinion, therefore, it being impossible to hold that the premises in question are private dwelling-houses, or parts of private dwelling-houses, the order of the Court of Appeal should be affirmed.

LORD SUMNER. (1) My Lords, except the residence of the master of Eastville Workhouse, which I gather is not the subject of controversy, the premises of the appellant guardians cannot by any stretch of language be called private dwelling-houses. They

(1) Read by Lord Shaw of Dunfermline.

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contain or consist of dwelling-houses it is true, but there is nothing private about them. The choice, therefore, appears to lie between holding that the respondents are bound to supply them with water for domestic purposes gratis, and holding that they are merely entitled to do so upon terms to be agreed. Sect. 26 of the Bristol Waterworks Amendment Act of 1865 at first sight offered a middle course. Standing alone, the expression "in addition to the water rents authorized by the Act of 1862," might have been construed as adding to the charging powers of the Act of 1862 a new and independent power to charge, and not merely a further charge where the Act of 1862 had provided an initial one; but the context, especially the preamble and s. 29, shews that the latter is the true meaning. The Act enables the undertakers to charge water rents exceeding those authorized by the Act of 1862. Any person, formerly chargeable, can be charged with a water rent, increased by a sum not exceeding one per cent. per annum on the annual rack rent or value. Another middle course was suggested under s. 68 of the Waterworks Clauses Act, 1847. May not water rates, not specifically provided for either in the Waterworks Clauses Act, 1847, or in the special Act, be payable according to the annual value of the tenement supplied with water, and in reasonable ratio thereto? If so, in case of dispute the annual value of the tenement would be determinable by two justices, but the reasonable ratio thereto only by a judge or jury. I cannot think that this anomaly was intended, nor does it appear to be within the scheme, either of the Waterworks Clauses Act, 1847, or of special Waterworks Acts, that the amount of water rents should be determinable by the test of reasonableness, or decided by the ordinary tribunals. The statutes themselves, or some machinery fixed by them, prescribe the sum to be charged, or else leave it to be fixed by the undertakers, subject to the restraint of a maximum.

The Bristol Waterworks Act of 1862 incorporates the Waterworks Clauses Act, 1847, "except where otherwise specially provided by this Act." This does not mean that if the same subject-matter is dealt with in a section of the private Act and in a section of the general Act the former alone is to be regarded. Sects. 35, 53, and 68 of the Act of 1847, and s. 68 of the Act of

1862, are to be read together as parts of one enactment, and as such can be reconciled; so that it is not necessary here to determine whether, in case of a real inconsistency, the common form sections of 1847 would prevail over the special sections of 1862, or whether the latter would be paramount over the former.

Sect. 53 of the Waterworks Clauses Act, 1847, entitles a certain genus of consumers, namely, owners or occupiers of dwelling-houses within the limits of the special Act, to demand and receive from the undertakers a sufficient supply of water for domestic purposes. Sect. 68 of the Act of 1862 entitles a particular species of this genus to a supply at prices determinable under the terms of that section itself. The differentiæ of this species are two; one is the private character of the dwelling-house, the other is its locality in a certain class of public streets or roads within the limits of the special Act. The sections are not inconsistent; so far as the first of these sections provides for the species which falls within the second, it leaves the second free to operate, and so far as it provides for consumers dehors that species, it is free to operate itself. If s. 68 of the Waterworks Clauses Act, 1847, had but prescribed both of the factors necessary for fixing the water rate to be charged instead of only one, no one would have detected any inconsistency between them.

The appellants, then, have the right to say that s. 53 of the Waterworks Clauses Act, 1847, stands incorporated in the Act of 1862, and under it they claim their supply. It is true that s. 68 of the Act of 1862 is not a mere charging section. It provides both for the right to be supplied and the obligation to pay for the supply, but it does not place persons requiring a domestic supply, who do not fall within it, beyond the pale of the general section. Then can the appellants avail themselves of s. 53? No provision fixing a water rent applies in their case. Can they nevertheless claim a sufficient supply under that section, and (somewhat shamefacedly it would seem) claim it for nothing?

I do not think they are precluded from doing so by the bare circumstance that the Bristol Waterworks Act has not fixed a

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water rent applicable to their case. There is no general principle that a domestic supply cannot be required, merely because the undertakers, designedly or by oversight, have failed to get inserted in their special Act a charge applicable to the particular case. Still, I agree with the observation of the Master of the Rolls, "in the absence of very clear words imposing an unconditional obligation, I think the absence of any provision for payment is a legitimate argument against the existence of the obligation." The scheme is that domestic supplies and payment of water rates shall be correlative obligations.

Sect. 53 of the Waterworks Clauses Act, 1847, entitles certain persons to a domestic supply. How are those persons ascertained? By their possession of certain qualifications, some permanent, some arising from time to time. It must be predicable of such persons that they are owners or occupiers of a dwelling-house or part of a dwelling-house, and that such premises are within the limits of the special Act. It must further be predicable of them that they have laid the communication pipes mentioned in s. 48. These qualifications are acquired, substantially, once for all. Again, it must be predicable of them that they have paid or tendered the water rate payable in respect of the supply according to the provisions of the Waterworks Clauses Act, 1847, that is to say, ss. 68 and 70, and of the special Act. If this cannot be predicated of them, no matter why, they are not within the section. It is not a provision that they shall be entitled to the supply provided they do certain things, in which case, since no payment is provided and lex non cogit ad impossibilia, they would get the supply and pay nothing; nor is the enactment that, subject to the performance of such conditions precedent as may have been prescribed, payment not being one, the supply shall be afforded. Such a person shall be entitled when he has paid or tendered the water rate payable. Inferentially when he has done neither, he shall not. The appellants cannot be such persons, for there is no water rate payable for them to tender or pay; therefore they are not entitled.

Three points are made against this construction. First, it is said that the clause is ambiguous and ought to be construed

against the undertakers. The answer is that it is not ambiguous. Two constructions are arguable and one is right; that is all. There is no rule that you must, if you possibly can, construe a Waterworks Act against the undertakers. Next, it is said that if the appellants cannot get a supply under s. 53 they cannot get it at all, because it would be ultra vires for the company to give it; the company is a corporation created by a statute which contains no express words conferring the power. It would be amazing if your Lordships were forced by any mere rule of construction to such a conclusion. The company is a trading company incorporated to sell water; it is authorized to sell water by contract for other than domestic purposes (s. 73 of the Act of 1862), but so as not to prejudice its ability to supply the full and adequate quantity required for domestic purposes. Why should it not sell its surplus water for domestic purposes to persons who are willing to buy it and unable to get it by force by the Act? A single word in the Act would suffice in such a case, and in my humble judgment it is to be found in s. 66, "for supplying the inhabitants within the limits of this Act with water," and in s. 73, "it shall be lawful to supply any person with water for other than domestic purposes," scilicet, other than such domestic purposes as are already provided for in the matter of their supply by this Act itself. Thirdly, it is said that the supply will at best be precarious, for the company has a practical monopoly. It may refuse and cannot be forced to agree terms. This may be so, but the answer is easy. In this country water is not alone procurable from undertakers. It sometimes falls from heaven. Besides, there are such things as wells. Still more, if the Legislature has seen fit to expose such bodies as the appellants to such a risk, it has doubtless had confidence in the business instincts of the undertakers over whom its power of passing further legislation always gives it the whip hand. That its confidence has not been misplaced is shewn by the fact that contracts have been made and performed with perfect satisfaction to both parties for many years till this dispute arose a short time ago. Even if the point were a serious one it could not justify me in saying that the Act means something that it does not mean, but I am satisfied that

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there is nothing in the point, and agree that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 6, 1914.

Solicitors for appellants: *Meredith, Mills & Clark, for Osborne, Ward, Vassall & Co., Bristol.*

Solicitors for respondents: *Woodcock, Ryland & Parker, for Edward Gerrish, Harris & Co., Bristol.*

Dictum of LORD SUMNER, at p. 452, *applied.* BOISSEVAIN *v.* WEIL. [1950] 1 All E.R. 728.

Considered. *Re* DIPLOCK. [1948] Ch. 465

Applied. *Re* DIPLOCK'S ESTATE. [1948] 2 All E.R. 318.

[HOUSE OF LORDS.]

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SINCLAIR . . . . . APPELLANT;

AND

BROUGHAM AND ANOTHER . . . . . RESPONDENTS.

Building Society — Borrowing — Unlimited Borrowing Powers — Banking Business—Ultra vires—Winding-up—Distribution of Assets—Priorities—Shareholders—Depositors—Trade Creditors—Money had and received—Tracing Order—Building Societies Act, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 1.

A building society formed in 1851 under the Building Societies Act, 1836, and empowered by its rules to borrow to an unlimited extent, started and developed a banking business. In 1911 the society was ordered to be wound up and questions of priority arose between the outside creditors, the unadvanced shareholders, and the bank customers on current and deposit account (for convenience called the depositors). The assets were insufficient for payment of all the claimants in full but were more than sufficient for payment of the outside creditors (who were subsequently paid by arrangement) and the shareholders:—

Held, (1.) that the power to borrow must be limited to borrowing for the proper objects of the society, and that the carrying on of the banking business was ultra vires. (2.) Distinguishing *In re Phœnix Life Assurance Co.* (1862) 2 J. & H. 441, and *Flood* v. *Irish Provident Assurance Co.* (1910) 46 Ir. L. T. 214; [1912] 2 Ch. 597, n., that the depositors were not entitled to recover moneys paid by them on an ultra vires contract of loan on the footing of money had and received by the society to their use. (3.) Applying the principle of *In re Hallett's*

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

Estate (1880) 13 Ch. D. 696, that the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the depositors could follow, as having been invalidly borrowed, and in part moneys which the society could follow, as having been wrongfully employed by its agents in the banking business, and (subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, and to the costs of the liquidation) ought to be distributed pari passu between the depositors and the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up.

In re Guardian Permanent Benefit Building Society (1882) 23 Ch. D. 440 considered and distinguished.

Blackburn and District Benefit Building Society v. *Cunliffe Brooks & Co.* (1885) 29 Ch. D. 902 overruled.

Decision of the Court of Appeal [1912] 2 Ch. 183 varied.

APPEAL from an order of the Court of Appeal affirming an order of Neville J. with reference to the distribution of the assets in the winding up of the Birkbeck Permanent Benefit Building Society. (1) The rules of the society are set out and the facts fully stated in the previous report of the case. The following summary of the facts is sufficient for the purposes of this appeal.

The society was formed in 1851 under the Building Societies Act, 1836, with rules which were duly certified and enrolled in pursuance of that Act; it was not registered under the Building Societies Act, 1874. The object of the society, as stated in rule 2, was to enable the members to raise a fund out of which they might be individually enabled, as provided by the rules, to purchase a dwelling-house or houses or other real or leasehold estate in any part of Great Britain; and rule 35 empowered the directors to borrow to an unlimited extent. From its inception the society made it part of its business to receive money on deposit from those who were willing to leave money in its hands, whether members of the society or not; and in the course of time the deposit branch of the society developed into a very extensive banking business, and the society became popularly known as the Birkbeck Bank and itself made use of this title in connection with its banking business. On June 20, 1911, an order was made for the winding up of the society. Questions of priority arose in the winding up between the outside creditors of the society, the

(1) [1912] 2 Ch. 183.

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unadvanced shareholders (who were divided into two classes, A and B), and the bank customers on current and deposit accounts (hereinafter called the depositors), and a summons for directions was taken out by the liquidator against representatives of the several classes of claimants. The fund in the hands of the liquidator was not sufficient for the payment of all the claimants in full but was more than sufficient for the payment of the outside creditors (who by arrangement had been paid before the date of this appeal) and the shareholders. Neville J. held that the power to borrow should be construed as limited by implication to the objects of the society; that the exercise of this power for the purpose of carrying on a banking business was ultra vires; and that the assets ought to be applied, after paying the costs of the liquidation, first in payment of the outside creditors, and then in payment of the A and B shareholders, the balance to be divided rateably between the depositors. The depositors appealed, but eventually a compromise was come to between the depositors and the A shareholders, to which the B shareholders were not parties. The Court of Appeal (the Master of the Rolls and Buckley L.J., Fletcher Moulton L.J. dissenting) affirmed the decision of Neville J., with the result that the B shareholders took priority over the depositors.

1913. Dec. 8, 9, 10, 12, 15. *Cave, K.C.*, and *Tomlin, K.C.*, for the appellant, who represented the depositors. The depositors claim to be creditors of the society and entitled as such to be paid out of the assets in priority to the shareholders. This appeal, however, relates only to the B shareholders because a compromise has been effected with the A shareholders. The Court of Appeal, on the authority of *In re Guardian Permanent Benefit Building Society* (1), have held that the depositors are entitled only to what is left of the assets after payment in full of the shareholders.

1. The transactions out of which the claims of the depositors arise were authorized by the rules and were not ultra vires the society. It will be said that the money obtained from the deposits was in excess of the legitimate requirements of

(1) 23 Ch. D. 440.

the society; but, having regard to the rules, which conferred an unlimited borrowing power on the society and contemplated borrowing by way of deposit, the depositors were not bound to inquire into the purposes for which the money was intended to be applied: *In re David Payne & Co.* (1) The banking business of the society was carried on openly and for a long period and on an extensive scale and the members knew all about it. Therefore, unless it can be said that this business was ultra vires the society and not merely ultra vires the directors, the members must be taken to have sanctioned that course of business: *Houldsworth* v. *Evans.* (2)

[VISCOUNT HALDANE L.C. referred to *Laing* v. *Reed.* (3)]

2. Assuming that these transactions were ultra vires in the fullest sense of the term, the depositors are entitled to recover on the footing of money had and received; or, 3., alternatively on the principle stated by Fletcher Moulton L.J., that the Court in distributing the assets in the winding-up will not allow any payment to the members to be made out of the assets until they have been purged of the moneys which the society through its agents improperly obtained. Where money is paid to a society upon a contract of deposit which is ultra vires, eo instanti a debt arises from the society or its agents to the depositor for money had and received by the society to his use. If a corporation gets into its hands the money of somebody else for no consideration and on no valid contract, it cannot keep the money but must pay it back; it is liable to an action for money had and received just as much as an individual is. If the decision of the Court of Appeal is right, every repayment made to a depositor was an improper payment and the society could get back every penny repaid during the last half-century. It would thus make an enormous profit out of its own wrong-doing. Some difficulty has arisen from confusing illegality and incompetence. This distinction has been clearly pointed out by Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (4) Where a contract is immoral or forbidden money paid under it cannot, as

(1) [1904] 2 Ch. 608.
(2) (1868) L. R. 3 H. L. 263.
(3) (1869) L. R. 5 Ch. 4, at p. 10.
(4) (1875) L. R. 7 H. L. 653, at p. 672.

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a general rule, be recovered by either party; but where there is nothing but incompetence, i.e., where it is a mere case of a contract having no binding effect on the corporation or individual, there is no rule of law which prevents the repayment of money paid under that contract. The doctrine of money had and received was propounded by Lord Mansfield in *Moses* v. *Macferlan* (1) where he says the action "lies for money which ex æquo et bono the defendant ought to refund," and is restated by him to the same effect in *Sadler* v. *Evans* (2), where he describes the action as "a liberal action, founded on large principles of equity, where the defendant cannot conscientiously hold the money."

[The LORD CHANCELLOR referred to *Royal Bank of Canada* v. *Rex* (3) and *Wilson* v. *Church* (4), affirmed sub nom. *National Bolivian Navigation Co.* v. *Wilson* (5), where Lord Esher said that this was not a mere equitable doctrine, but was a common law right.]

In many common law cases it is treated as an action of assumpsit.

The doctrine has been applied in many cases—e.g., in cases of gaming contracts—in which money paid upon a contract which is void but not immoral has been recovered as having been paid for a consideration which has wholly failed: *Jaques* v. *Golightly* (6); *Jaques* v. *Withy and Reid* (7); *Tappenden* v. *Randall* (8); *Hastelow* v. *Jackson* (9); *Diggle* v. *Higgs* (10); *Shoolbred* v. *Roberts*. (11) This doctrine applies to a corporation—*Hall* v. *Mayor of Swansea* (12)—and to an ultra vires transaction: *In re Phœnix Life Assurance Co.* (13), where premiums paid under a policy which was ultra vires were held to be recoverable. That has been followed by the Court of Appeal in Ireland in *Flood* v. *Irish Provident Assurance Co.* (14) Those two cases are very much in point. The doctrine of money had and received has

(1) (1760) 2 Burr. 1005.
(2) (1766) 4 Burr. 1984.
(3) [1913] A. C. 283.
(4) (1879) 13 Ch. D. 1.
(5) (1880) 5 App. Cas. 176.
(6) (1776) 2 W. Bl. 1073.
(7) (1788) 1 H. Bl. 65.
(8) (1801) 2 Bos. & P. 467.
(9) (1828) 8 B. & C. 221.
(10) (1877) 2 Ex. D. 422.
(11) [1899] 2 Q. B. 560.
(12) (1844) 5 Q. B. 526.
(13) 2 J. & H. 441.
(14) 46 Ir. L. T. 214: [1912] 2 Ch. 597, n.

been recently considered in *Lodge* v. *National Union Investment Co.* (1) and *Baylis* v. *Bishop of London.* (2) In the latter case the money was recovered from the bishop although he had paid it away.

Coming now to the building society cases, it must be remembered that they are all actions on contract; in no case was there an action for money had and received. In *In re National Permanent Benefit Building Society* (3) it was held that a person who lent money to a society which had under its rules no power to borrow had no legal or equitable debt against the society and therefore could not maintain a petition for an order to wind up the society. That must mean "no legal or equitable debt upon the contract of loan." In that case there was no suggestion of any claim for money had and received. In *In re Guardian Benefit Building Society* (4) the Court of Appeal held (in Crace Calvert's case) that a rule conferring upon a building society an unlimited power to borrow was void, and that persons advancing money under it could prove in the winding-up only against the assets which remained after paying the outside creditors and the unadvanced members. That was not a logical judgment because unless the lenders were entitled as creditors the whole of the surplus belonged to the shareholders. In *Murray* v. *Scott* (5) the third appeal was from a decision following Crace Calvert's case and this House, reversing the decision of the Court of Appeal, held that the rule was valid. Sir Horace Davey in his argument in support of the appeal took the point that, assuming the rule to be invalid, the lenders were entitled to recover on the footing of money had and received, but there was no decision on the point because, in the view taken by the House, it became unnecessary to decide it. In *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (6) a building society which had no power to borrow was allowed by its bankers to overdraw, and certain deeds were deposited with the bankers to secure the overdraft. It was held (1.) that the overdrawing was ultra vires

(1) [1907] 1 Ch. 300.
(2) [1913] 1 Ch. 127.
(3) (1869) L. R. 5 Ch. 309.
(4) 23 Ch. D. 440.
(5) (1884) 9 App. Cas. 519, 529.
(6) (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857.

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and that the bankers had no lien on the deeds, but (2.), following the principle of *In re Cork and Youghal Ry. Co.* (1), that they were entitled to hold the deeds as security for so much of the money advanced as had been applied in paying the lawful debts and liabilities of the company. On the form of the claim in that case no point arose or could arise whether there was a liability ab initio on the footing of money had and received by the society. In *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (No. 2) (2), which was another action in the same matter, the liquidators of the society were held entitled to recover from the bankers all moneys which had been paid by the society to the bankers and applied by them in discharge of an ultra vires loan. That proceeded on the footing that it was unlawful for the society to repay moneys which it had no power to borrow. That is an extraordinary decision and, if it is law, it stands in the appellant's way. That decision was followed in *Ex parte Watson* (3) and in *In re Bottomgate Industrial Co-operative Society.* (4) The latter case, however, is distinguishable, inasmuch as the transactions there complained of were a direct infringement of the Act under which the society was formed: *Baroness Wenlock* v. *River Dee Co.* (5) was a mere decision that the contract itself was void.

[VISCOUNT HALDANE L.C. Why should not the principle of *In re Hallett's Estate* (6) be applied to this case?]

That case decides that if A. holds property of B. in a fiduciary character and pays it together with his own money into his banking account and draws money out of the account, he must be taken to have drawn out his own money in preference to B.'s. The principle of that case is really based, not upon trusteeship in the narrow sense, but upon ownership. That is to say, if property of B. is found in the hands of A., then prima facie A. is in a wide sense in a fiduciary relationship towards B., because equity affects his conscience with regard to that particular property, and B. can follow it and take it out of the hands of A. This is the view taken by Lord Lindley in his book on Partnership,

(1) (1869) L. R. 4 Ch. 748.
(2) 29 Ch. D. 902.
(3) (1888) 21 Q. B. D. 301.
(4) (1891) 65 L. T. 712.
(5) (1885) 10 App. Cas. 354.
(6) 13 Ch. D. 696.

5th ed., p. 162. In this case the parties intended to create the relationship of debtor and creditor, but, being incompetent to do so, they made in law no contract at all, and, consequently, no title passed and the money in the bank remained the money of the depositor. This result follows from the view of the transaction taken by the shareholders themselves. The principle of *In re Hallett's Estate* (1) has been applied in *Hancock* v. *Smith* (2), *In re Mouat* (3), and *In re Oatway.* (4) The depositors are entitled to succeed, first, on the principle of *In re Hallett's Estate* (1); secondly, on the principle of money had and received; and, thirdly, on the principle elaborated by Fletcher Moulton L.J. in his dissentient judgment. In the United States the Supreme Court has laid down the law in accordance with these principles: *Central Transportation Co.* v. *Pullman's Palace Car Co.* (5)

Clauson, K.C., and *Cecil Turner*, for the respondent Brougham, the official receiver and liquidator.

Upjohn, K.C., and *Younger, K.C.* (with them *A. M. W. Wells*), for the respondent Ravenscroft, who represented the B shareholders. The sole question is whether the law of ultra vires with respect to borrowing powers does not prevent the application of all the remedies which have been discussed in the course of the argument for the appellant. The summons taken out by the liquidator does not deal with the rights of individuals but with the general rights of different classes of claimants in the distribution of the assets of the society, and the question which this House has to determine is the validity of the claim of the depositors as a class to a general right of proof against the assets as a whole. The authorities establish the following propositions. 1. A building society, though not incorporated, is not a common law partnership or a mere joint adventure, but a statutory association and subject to the law of ultra vires: *In re Blackburn and District Benefit Building Society* (6), affirmed by this House sub nom. *Walton* v. *Edge* (7); *Amalgamated Society*

(1) 13 Ch. D. 696.
(2) (1889) 41 Ch. D. 456.
(3) [1899] 1 Ch. 831.
(4) [1903] 2 Ch. 356.
(5) (1891) 139 U. S. 24, at p. 57.
(6) (1883) 24 Ch. D. 421.
(7) (1884) 10 App. Cas. 33.

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of Railway Servants v. *Osborne* (1); *Chapleo* v. *Brunswick Building Society* (2); *Brownlie* v. *Russell* (3); Lindley on Companies, 6th ed., vol. ii., p. 1233. 2. An ultra vires contract of loan is void and gives rise to no debt, subject only to the qualification that, if money paid under an ultra vires contract of loan is applied in discharge of lawful obligations of the society, to that extent there is no increase of the society's pecuniary obligations and the doctrine of ultra vires is excluded and the contract saved: *In re Cork and Youghal Ry. Co.* (4); *In re National Permanent Benefit Building Society* (5); *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (6); *In re Blackburn and District Benefit Building Society* (7); *Walton* v. *Edge* (8); *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (No. 2) (9); *Baroness Wenlock* v. *River Dee Co.* (10); *Murray* v. *Scott* (11); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (12) 3. Subject to this qualification, money paid under an ultra vires contract does not become the property of the society but remains the property of the payer, and so long as he can identify it he may trace it through any number of changes and claim it on the footing that it is and always has been his property. That is the remedy by a tracing order; but the burden of proving the identity is on the person who alleges it. 4. Apart from a tracing order there is no remedy against the society which has received the money, either by an action for money had and received, or by an action for damages or compensation for wrongfully appropriating the money paid over, or by any form of action to recover money as a debt or damages or compensation on any ground legal or equitable, because to allow any such action would be to enable the society to transgress its borrowing limits. See the cases above cited, and particularly *Chapleo* v. *Brunswick Building Society*. (2) 5. The persons, however, who have paid over their money upon an ultra vires

(1) [1910] A. C. 87, at p. 94.
(2) (1881) 6 Q. B. D. 696.
(3) (1883) 8 App. Cas. 235, at p. 248.
(4) L. R. 4 Ch. 748.
(5) L. R. 5 Ch. 309.
(6) 22 Ch. D. 61; 9 App. Cas. 857.
(7) 24 Ch. D. 421.
(8) 10 App. Cas. 33.
(9) 29 Ch. D. 902.
(10) 1885) 36 Ch. D. 675, n.; 10 App. Cas. 354.
(11) 9 App. Cas. 519.
(12) [1898] 2 Ch. 663; [1899] 1 Ch. 440.

contract of loan may have any number of remedies against individuals for breach of warranty of authority or fraudulent misrepresentation or on any other competent ground; and 6. they would be further entitled on the winding up of the society to the limited remedy granted by the order in *In re Guardian Permanent Benefit Building Society* (1), which is a rough kind of tracing order. It may be that the order in that case was not strictly logical because it was impossible to prove that the actual depositors before the Court were the persons entitled to the surplus funds, but it proceeded on the principle of exhaustion. In that case, as in this, it was obvious that the society had made no profits, and it was held that after all the legal claims on the fund had been satisfied, i.e., after the creditors had been paid in full and the shareholders had received back the amount of the subscriptions due to them, the surplus must belong to the depositors, because no one else had any legal claim upon it, and accordingly they were allowed to participate pari passu in that surplus. The shareholders, however, are not concerned to defend that order, but they contend that the depositors are entitled to no higher remedy. The carrying on of a banking business by the Birkbeck Society was clearly ultra vires. Either it was not authorized by the rule conferring the borrowing powers or the rule itself was ultra vires. Some case of ratification was made against the shareholders on the ground of knowledge and acquiescence, but there can be no ratification of a nullity: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) Then it was said that what was ultra vires was not the loan transaction, but the subsequent application of the moneys for the purposes of the banking business. But if the banking business was ultra vires, any dealing with the society in the course of that ultra vires business was also ultra vires; it is not a question of the application of the moneys. *In re David Payne & Co.* (3) has therefore no application.

The claim of the depositors to priority over the shareholders must be put either on property or on obligation. It cannot be put on property because no individual has attempted to trace

(1) 23 Ch. D. 440. (2) L. R. 7 H. L. 653, at p. 672.
(3) [1904] 2 Ch. 608.

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his money into the assets now in the hands of the liquidator, and there can be no right of property without identification. This issue was not raised by the summons and it was not raised by counsel in the Courts below or in opening the appeal to this House, and there is here no proof that the moneys belonged to the depositors. Nobody ever suggested that unless there could be a tracing order proper—that is, an order enabling an individual banking creditor to trace his debt into some asset of the society—any claim could be made by the depositors on the ground of property. The doctrine of tracing has never been extended so as to make it apply to the collective claims of the depositors as a class, and so to extend it would be, in substance, to increase the liabilities of the society and to prejudice the rights of legitimate creditors. Such a tracing could only be a matter of speculation, and in this particular case speculation without any real knowledge of the facts. The assets of the society in the winding-up are admittedly insufficient to satisfy the claims of the shareholders and the depositors in full, and it is impossible to say on the evidence what proportion belongs to the depositors. If it is permissible to conjecture, the probability is that the assets attributable to the banking business must have been reduced to a larger extent than the assets attributable to the legitimate business of the society, but the House is not in possession of the requisite materials to enable it to form any judgment on the matter. The right of the depositors to a tracing order must have arisen when the society was a going concern, and if their money got into the indigesta moles of the society's funds and was incapable of being traced, then, if the depositors were to be allowed to force the society to realize its funds in order to see what proportion of the total sum represented their money, as a matter of practical expediency, the society would be bound to pay the money, and that would be, in effect, to increase the liabilities of the society as the result of an ultra vires borrowing. Further, if the claim is put upon property, the depositors would be entitled in priority to the outside creditors, because the claim proceeds upon the assumption that the money paid to the society by the depositors was never the property of the society at all; but no such right is asserted by the depositors. It is impossible to give effect to the

claims of the depositors after the claims of the outside creditors and before the claims of the shareholders, because that would be to sandwich a claim based upon property between two claims based upon obligation, and such a distribution would result in giving more to those whose claims were illegitimate, because arising out of an ultra vires borrowing, than to those whose claims arose out of the legitimate business of the society. *In re Hallett's Estate* (1) has no application to the present case. If the appellant's contention is sound it is remarkable that the principle of that case should never have been applied in any of the building society cases. It was not applied in *In re Guardian Permanent Benefit Building Society* (2); but, if it had been applicable, it is inconceivable that so great a master of equity as Sir George Jessel, who took part in the decision in *Hallett's Case* (1) and also in the *Guardian Case* (2), which was decided less than three years later, should have overlooked his earlier decision. *Hallett's Case* (1) is confined to cases where there is a valid transaction creating a fiduciary relationship or where the circumstances are such that the old Court of Chancery would have impressed upon the person who had the property the character of a constructive trustee. To hold otherwise would be to confuse the equitable liability on the footing of fiduciary relationship with the common law liability arising from a tort. To treat an ultra vires contract of loan as a bailment or a trust is to assign a different character to the transaction and is a mere device to evade the law of ultra vires. Nor can the claim of the depositors be put upon debt or obligation, because that would be to sweep away the doctrine of ultra vires. The Court will not assist an ultra vires lender in any way which adds to the liabilities of the society. See per Lord Selborne in *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (3) Therefore the doctrine of money had and received has no application. Lord Mansfield, who laid down the principle in the widest terms, expressly excepted the case of a debt contracted during infancy because the infant was under a disability. Exactly the same principle applies to the society in this case. The reason why the

(1) 13 Ch. D. 696. (2) 23 Ch. D. 446.

(3) 22 Ch. D. 61, at p. 71.

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society cannot be bound, either directly or indirectly, to repay the money lent is that in regard to these borrowing transactions it was under a disability. Only two of the cases cited by the appellant on the doctrine of money had and received relate to ultra vires transactions, namely, *In re Phœnix Life Assurance Co.* (1) and *Flood* v. *Irish Provident Assurance Co.* (2), and in neither of those cases was there a borrowing. Those two cases are explicable upon the theory that, as there was no power to issue the policy, there never was any risk, and, therefore, the premiums could be recovered back as having been paid for a consideration which had failed. They raised no question of exceeding borrowing powers. In the interval between the two cases all the building society cases were decided, but in the Irish case no reference was made to any of those decisions.

Cave, K.C., replied.

The House took time for consideration.

1914. Feb. 12. VISCOUNT HALDANE L.C. My Lords, in the opinion which I am about to deliver Lord Atkinson desires me to state that he concurs.

In June, 1911, an order was made for the winding up of the Birkbeck Permanent Benefit Building Society. The society was formed in 1851, under the Building Societies Act of 1836, with rules which, with certain amendments subsequently made, were duly certified and enrolled. The object of the society, according to these rules, was to enable the members to raise a fund out of which they might be individually enabled to buy or build houses. Rule 35 conferred on the directors a power to borrow without limit, but it is clear that the power so given could not extend beyond borrowing for the legitimate purposes of the society. There were two classes of shareholders, those to whom loans were granted and those who were mere investors. Under an amending rule the investing shares were divided into two classes, "A" shares and "B" shares, differing mainly in this respect, that the "A" shares matured and were to be paid off after a certain period, while the "B" shares were permanent. The shareholder

(1) 2 J. & H. 441. (2) 46 Ir. L. T. 214; [1912] 2 Ch. 597, n.

could, however, in either case give notice and withdraw the amount of his share.

During the earlier period of the society's existence the funds, which were derived both from shares and from loans by depositors, were laid out in mortgages to members. Later on, while the society continued its business as a building society, it began gradually to increase its deposits and to do the business of a banker. In the balance-sheet of March 31, 1910, the liabilities to shareholders are stated to amount to 1,053,728*l.*, while the liabilities to depositors are 10,784,323*l.* The assets are stated to include mortgages from advanced members, loans, and property in hand, amounting to 726,610*l.*; money at call, short loans and advances to customers, 995,466*l.*; investments in various kinds of stocks, shares, and debentures, 8,740,788*l.*; ground rents, 433,826*l.*; and cash at the bankers and in hand, 1,069,753*l.*

The society had begun, about 1871, to call itself the Birkbeck Bank. Many of its business documents came to be so headed, and it is obvious that at the time when it was wound up it had, while still retaining its business as a building society, turned much the larger part of its enterprise into that of a bank.

My Lords, notwithstanding that the Act of 1836 does not incorporate the building societies registered under it, its provisions make it clear that such a course as the Birkbeck Society took was contrary to these statutory provisions, and the apparent action of the society in carrying on the business of banking and in borrowing for that purpose was, therefore, ultra vires, and was not in contemplation of law the action of the society. The contracts entered into for the purposes of this business were accordingly, so far as the society was concerned, void.

The questions which now arise are in substance how the liquidator is to dispose of the mass of assets in his hands. He raised these questions before Neville J. on a summons. The learned judge ordered the assets to be applied, firstly, in payment of costs; secondly, (as I gather by general consent) in paying debts properly incurred to outside creditors; thirdly, in paying the unadvanced members or shareholders the amounts due to them in respect of the subscriptions paid on their shares,

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including any bonus and interest to which they were entitled by the rules ; and, fourthly, in distribution of the balance among the customers of the society on deposit or current account (for brevity I shall speak of these as depositors) in proportion to the amounts standing to their credit in the books. The majority in the Court of Appeal (the Master of the Rolls and Buckley L.J.—Fletcher Moulton L.J. dissenting) took the same view. The decision of that majority was based on the following grounds.

They held, first of all, that the rule enabling borrowing did not authorize the society to engage in banking business, and that its action in so doing was altogether ultra vires. My Lords, I think that on this point there is no doubt that the Courts below were right, and that they carried their view to its proper conclusion when they held that every receipt on deposit for the purposes of such business was ultra vires. The majority went on to hold that in so far as the legitimate indebtedness of the society was not increased, for the reason that the money borrowed was applied in the payment of legitimate debts, the depositors could be treated as subrogated to the rights of these debtors, at all events to the extent of their debts, as distinguished from any securities for these debts. They also thought that if the depositors could identify their money as earmarked they could follow it under what is called a tracing judgment. But they held that unless the depositors could bring themselves within one or other of these propositions they could not claim to be creditors either at law or in equity, and that their only right was to an order such as was made in the case of the *Guardian Permanent Benefit Building Society* (1), which would give them the surplus assets after payment of all legitimate debts and of twenty shillings in the pound to the members or shareholders. It was the order made in that case which Neville J. had followed. Buckley L.J. referred to difficulties which he felt in understanding the decision of Sir George Jessel in the *Guardian Building Society Case*. (1) He was unable to see why, if the assets belonged to the society, the members were not held entitled, not only to twenty shillings in the pound, but to the share in the surplus which the rules gave them. But he considered that the

(1) 23 Ch. D. 440.

Court of Appeal were bound by the decision of the Court of Appeal in that case. For reasons to which I will refer later on, it will appear that I share the difficulty in understanding this decision which Buckley L.J. experienced.

Fletcher Moulton L.J. was of opinion that the principle which the authorities had laid down carried with it the consequence that the Court would not, even in the case of an ultra vires transaction which could give rise to no debt, as between the parties to the transaction permit the one who had wrongfully received the money to keep it merely because he was in possession of it. He thought that, as the money must be taken to have been received by the misrepresentation or carelessness of its agents, the society could not keep it as against the depositors. This seemed to him to be implied in what was laid down in the *Guardian Society's Case* (1), not merely in the Court of Appeal, but in the subsequent decision on appeal to the House of Lords (*Murray* v. *Scott* (2)). He held that not until the society had made restitution of this money (which was never really part of the assets) to the depositors could there be assets belonging to the society which ought to be distributed on the principle laid down by Sir George Jessel in the *Guardian Society's Case*. (1) To proceed otherwise would be to look at possession only, and to disregard rights of property. He therefore dissented, holding that the depositors should be paid in priority to the B shareholders. With the A shareholders a settlement had been come to, and as to their title no question was then, or is now, raised.

My Lords, the question before the House is whether Neville J. and the majority in the Court of Appeal arrived at a conclusion which was right in point of principle, apart from the authorities, and whether, if your Lordships should be disposed to differ from them, we are so bound by the authorities, and particularly by the cases decided in this House, that we are precluded from arriving at a different conclusion. It is contended for the appellants that they are entitled to succeed in recovering their deposits either on the footing of being money had and received by the society to their use, or as being money which never truly

(1) 23 Ch. D. 440. (2) 9 App. Cas. 519.

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formed part of the assets, and which can now be followed in the hands of the society's agents and the liquidator.

I propose to consider in the first place the question whether an action for money had and received would have lain against the society on the footing that although its conduct in receiving the depositors' money was ultra vires, it had become improperly, as between itself and the depositors, enriched thereby, so that the amount received was money held to the depositors' use and recoverable as a debt, independently of any right to trace and follow. Two authorities were cited in support of the argument that such an action could have been brought successfully. One of these was a judgment of Sir William Page Wood V.-C. in the case of the *Phœnix Life Assurance Co.* (1) The other was a decision of the Court of Appeal in Ireland which followed his judgment in *Flood* v. *Irish Provident Assurance Co.* (2) In these cases the principle of tracing was not relied on, but it was apparently held that the amount of certain premiums which had been paid in respect of policies, the issue of which was ultra vires, could be recovered as money had and received.

My Lords, if these decisions had related to the recovery of borrowed money I should find it difficult to reconcile them with principle. If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would on principle appear to be one in rem and not in personam, a claim to follow and recover specifically any money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie in personam against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into any contract for repayment, is to strike at the root of the doctrine of ultra vires as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure.

It is, therefore, binding both at law and in equity. In the jurisprudence of England the doctrine of ultra vires must now be

(1) 2 J. & H. 441. (2) 46 Ir. L. T. 214; [1912] 2 Ch. 597, n.

treated as established in a stringent form by Acts of the Legislature and decisions of great authority which have interpreted these Acts. This is a principle which it appears to me must to-day be taken as a governing one, not only at law but in equity. I think it excludes from the law of England any claim in personam based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is ultra vires. All analogies drawn from other systems, such as that of the Roman law, appear to me to be qualified in their application by two considerations. The first is that, broadly speaking, so far as proceedings in personam are concerned, the common law of England really recognizes (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed. This is a point to which I shall have to return later on in what I have to say. The second consideration is that where an Act of Parliament imposes a restriction on capacity, that restriction is binding in equity as much as at law, the principles of which equity follows.

Nor does the difficulty of extending the scope of the judgments of Sir William Page Wood and the Irish Court of Appeal to cases of borrowing appear less when the foundation of the action for money had and received is investigated. Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law. *Moses* v. *Macferlan* (1) is the leading case on this point. It was an action on the case for money had and received under circumstances where any notion of an actual contract was excluded. But Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract."

(1) 2 Burr. 1005.

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The claim in *Moses* v. *Macferlan* (1) was one of assumpsit in the form of the common indebitatus assumpsit count. This was a form of claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in consimili casu under the provisions of c. 24 of the Statute of Westminster (13 Edw. 1). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of assumpsit, arose. In *Slade's Case* (2) the judges resolved that "every contract executory imports in itself an assumpsit," with the result that it became no longer necessary or desirable to use as the remedy where money was due the action of debt, which was embarrassing because it let in the right to a "wager of law." Then came the extension of indebitatus assumpsit to cases in which it was clear that no express promise could be proved. For, as Lord Mansfield points out, the law is ready to imply a debt in such cases arising quasi ex contractu. The promise to pay which created the right of action might have been a pure fiction of law. In many cases no such promise could possibly have been established. Yet it took some time before the judges brought themselves to go so far. *Starke* v. *Cheesman* (3) was a claim on a bill of exchange by the holder against the drawer on the allegation that the drawee had refused to accept. It was held that an actual promise must be implied. But what is remarkable is the language of the judgment in which the declaration, which contained an indebitatus assumpsit count, was held good. Holt C.J. is reported to have said "that the notion of promises in law was a metaphysical (4) notion, for the law makes no promise, but where there is a promise of the party." Yet, the observation of Holt C.J. notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally gave the action its comprehensive range, and made

(1) 2 Burr. 1005.
(2) (1602) 4 Rep. 92b.
(3) (1699) 1 Ld. Raym. 538.
(4) *I.e.* fanciful, as certain poets, about the same time and later, were classed as "metaphysical."—F. P.

it available even where no fact importing or implying privity of contract could be proved. The history of the action of assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shews how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally he says: "In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment." (1)

My Lords, notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise. And it appears to me that as matter of principle the law of England cannot now, consistently with the interpretation which the Courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been ultra vires to give it. The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual.

I am accordingly of opinion that while the decisions of Sir William Page Wood and of the Irish Court of Appeal to which I have referred may possibly, notwithstanding that the issue of the policies was ultra vires, be supported on the ground that they

(1) Lectures on Legal History, p. 166.

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related merely to the failure of consideration for the premiums paid (a question on which it is unnecessary for me to express any opinion), they cannot be invoked as authorities for the proposition that an action for money had and received would have lain in a case of borrowing ultra vires.

It follows that the depositors in the present case will not succeed unless they are able to trace their money into the hands of the society or its agents as actually existing assets. The question is whether they are able to establish enough to succeed upon this footing. Their claim cannot be in personam and must be in rem, a claim to follow and recover property with which, in equity at all events, they had never really parted.

I proceed, therefore, to consider the case on this restricted footing. The evidence is very scanty, but it must be taken that the depositors' money was used on a large scale in acquiring the assets now in the liquidator's hands; for the value of these assets is far in excess of the contributions of the shareholders, and much of it can be due to the money of the depositors alone. The difficulty of establishing a title in rem in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.

But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money. This is a principle not

merely of equity, but of the common law. It is explained in the judgment of Lord Ellenborough in *Taylor* v. *Plumer* (1), who pointed out that there was no reason why the doctrine that money could not be followed should apply to circumstances in which a broker had wrongfully invested money of his principal in purchasing securities into which it could be traced. The reason of this is plain. The broker could not in these circumstances set up as against his principal the rule which applies to what has been paid over as currency, that ordinarily transfer of possession is transfer of property. So long as the money which the principal has handed to his agent to be applied specifically, and not on a debtor and creditor account, can be traced into what has been procured with it, the principal can waive his right of action for damages for tort, and, affirming the proceeding of the broker, claim that his money is invested in a specific thing, which is his. But Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money.

That seems to be, so far as the doctrine of the common law is concerned, the limit to which the exception to the rule about currency was carried; whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can, even at law, follow, but only so long as the relation of debtor and creditor has not superseded the right in rem. This is well put by Bramwell L.J. in *Ex parte Cooke* (2), who explains why the principal in *Taylor* v. *Plumer* (1) could claim the money: "Because the money was paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character, so as *not* to create the mere relation of debtor and creditor between him and his principal." Thesiger L.J. in *In*

(1) (1815) 3 M. & S. 562. (2) (1876) 4 Ch. D. 123.

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re Hallett's Estate (1) states the principle in other words, but to the same effect: "All cases where it has been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and cestui que trust, or principal and agent."

My Lords, it is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation may be in this position, but it is not because of his trust or fiduciary duty. The common law, which we are now considering, did not take cognizance of such duties. It looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me to be, on ground of principle, as true of money paid under mistake of fact or on an ultra vires contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee.

But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrong-doer into his account with his banker, who simply owed him a debt, so that no money was or could be, in the contemplation of a Court of law, earmarked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrong-doer,

(1) 13 Ch. D. 696, at p. 723.

that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was. And, as Jessel M.R. pointed out in *Hallett's Case* (1), this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the plaintiff. If so, subject to certain qualifications which I shall presently make, I see no reason why the remedy explained by Jessel M.R. in *Hallett's Case* (1), of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is ultra vires. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle.

My Lords, there was another point which was decided in *Hallett's Case*. (1) Jessel M.R. and Baggallay L.J. held that the rule in *Clayton's Case* (2) did not apply so as to determine by reference to dates the appropriation of cheques drawn on the bank account, inasmuch as they considered that a person standing in a fiduciary relationship must be taken to have intended to draw cheques for his own purposes only on so much of the balance as was his. On this second point Thesiger L.J. dissented from the majority. He thought that he was bound by the decision in *Pennell* v. *Deffell* (3) and the subsequent authorities which had followed it. "Equity," he said (4), "has gone very far in aid of trust creditors when it holds that they may follow and obtain, in priority to general creditors, moneys paid to a banker, and therefore no longer existing in specie, as moneys numbered and earmarked, but converted into a debt; and it may be that the distinguished judges I have referred to may have thought that equity had gone far enough, and that, in the absence

(1) 13 Ch. D. 696.
(2) (1816) 1 Mer. 572.
(3) (1853) 4 D. M. & G. 372.
(4) 13 Ch. D. at p. 752.

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of express appropriation, the general rule of appropriation of payments in and out of a banker's account should apply to that debt when forming part of a larger debt made up as to the rest of the moneys, not trust moneys, paid into the bank."

My Lords, as all the outside creditors have been paid off by consent, we have not in the appeal before the House to consider the decision in *Hallett's Case* (1) on this second point. And I do not desire to be taken as indicating any opinion on a question which is not before us, and to which I have only referred for the purpose of making this clear.

I now proceed to apply these conclusions to the case we have to deal with. I must begin by pointing out that the circumstances here are in material points different from those in *Hallett's Case*. (1) There the agent had in breach of his duty paid the money of his principal into his bank, so that it formed part of a general debt due to him on current account with the bankers. It was held that the money of the principal must be paid to him out of the debt so due. To call the right of the principal a charge on the debt, as Jessel M.R. did, was only to express compendiously, but somewhat loosely, that the indebtedness was for a single sum, of which the amount of the principal's money formed an integral part, and that the agent could not draw on account of the single sum, in which he had improperly mixed his own funds with the money of his principal, until he had made good the amount of that money.

For the purpose of the question before us the really relevant part of the judgment in *Hallett's Case* (1) is that which shews how the difficulty of following money into a debtor and creditor account like a banker's is got over in equity. The loan to the banker was regarded as an investment pro tanto of the principal's money, and the latter was treated as entitled to waive the breach of duty by his agent, and to claim the investment to the extent of the amount due to him as made on his behalf. The agent could not set up that any part of the money in the bank was his until he had made good his breach of duty, and in that sense there was a charge.

In the present case the investment was not made in breach of

(1) 13 Ch. D. 696.

a fiduciary duty on the part of the society, and it was actually made with the authority of the depositors. What was a material point in *Hallett's Case* (1), therefore, does not occur here. No doubt it was ultra vires of the society to undertake to repay the money. But it was none the less intended that in consideration of giving such an undertaking the society should be entitled to deal with it freely as its own. The consideration failed and the depositors had the right to follow the money so far as invalidly borrowed into the assets in which it had been invested, whether these assets were mere debts due to the society or ordinary securities, but that was their only right.

As to the part of the assets which was acquired with money paid by the shareholders, the case appears to me to be free from difficulty. The money paid to the society by the shareholders was paid as the consideration for the shares which were issued to them. That money, therefore, beyond question, became the money of the society. A large part of it has probably been applied ultra vires in the acquisition of the assets of the banking business. These assets can accordingly be claimed only by the society itself as belonging to it, and the shareholders have no direct title to them.

The total mass of assets which the liquidator has to distribute thus represents in part money which the depositors are entitled to follow and in part money which the society is entitled to follow. If the present value of these assets was equivalent to the total amount of such money, there would be no difficulty; the assets would be apportioned according to the sources from which they came. Does it make a difference that the value has shrunk so that the two sets of claimants cannot be paid in full? I do not think so. The position of the society is different from that of the agent in *Hallett's Case*. (1) The depositors have no alternative right in this case to disaffirm the transaction to the extent of claiming on the footing that their money has been applied in breach of trust. All they can do is to adopt the dealings with the money that they handed over, under circumstances in which it never really ceased to be theirs, and claim the part of the mass of assets which represents it as belonging to them in equity.

(1) 13 Ch. D. 696.

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There has been no breach of fiduciary duty on the part of the society, and it appears to me that this circumstance is material in distinguishing the consequences here from those which followed in *Hallett's Case* (1) on the footing that there the agent could not gain, at the expense of the principal, an advantage for himself or his general creditors by in effect setting up a breach of duty. The depositors can, in my opinion, only claim the depreciated assets which represent their money, and nothing more. It follows that the principle to be adopted in the distribution must be apportionment on the footing that depreciation and loss are to be borne pro rata. I am, of course, assuming in saying this that specific tracing is not now possible.

What is there must be apportioned accordingly among those whose money it represents, and the question of how the apportionment should be made is one of fact. In the present case the working out of a proper apportionment based on the principle of tracing not only would involve immense labour but would be unlikely to end in any reliable result. The records necessary for tracing the dealings with the funds do not exist. We have therefore, treating the question as one of presumption of fact, to give such a direction to the liquidator as is calculated to bring about a result consistent with the principles already laid down.

I think that this direction should be that, without disturbing anything that has up to now been settled or agreed, he should apportion the entirety of the remaining assets (including mortgages and loans) between the depositors and the shareholders in proportion to the amounts paid by the depositors and the shareholders respectively. In this way I am of opinion that the nearest approach practicable to substantial justice will be done. I think that this is the utmost extent to which, consistently with well-established principles, a Court of justice can go in compelling the society to restore that of which it has become possessed through its ultra vires transactions. In his dissenting judgment in the Court of Appeal, Fletcher Moulton L.J. proposed to go further, and to apply the assets in paying the depositors before the shareholders received anything. For reasons which result from what I have already stated, I think that to do this would

(1) 13 Ch. D. 696.

really be inconsistent with settled law as to the effect of ultra vires transactions. What I propose is, I think, not at variance with what this House actually decided in *Murray* v. *Scott* (1), and in such cases as *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (2) and *Baroness Wenlock* v. *River Dee Co.* (3)

It is not the method of distribution directed in the case of the *Guardian Permanent Benefit Building Society* (4), where the Court of Appeal said that not only the creditors of the society, but the unadvanced members, must be paid in the first instance, and the balance only divided among the lenders from whom advances had been obtained without legal authority. But I do not think that the decision there upon this point can be upheld unless on the facts in that case no reliable attempt to trace was held to be possible. If such presumptions as to the source of the assets could have been made as I think must be made in the present case, the method of distribution adopted would not have been justifiable on the assumption that the principle I have stated is the right one. There is much force in the criticism of the judgments in that case made by Fletcher Moulton L.J. and by Buckley L.J. in the present case. The reasoning implied in those judgments appears to me to have been pushed to an extent which, unless carefully qualified, establishes, not its conclusion, but either too much or too little.

The agents of the society in the present case, unlike the Guardian Society, have acted ultra vires in the application not only of the depositors' but of the society's own money, by lending it to customers with whom it dealt as a banker and in investing it in securities for banking purposes. And we are not dealing with any question in which the shareholders are seeking to claim against the society on a footing inconsistent with their true contract as quasi partners. It is in their case, as in that of the depositors, a question only of a right to follow, and in a distribution by a liquidator based on this principle, I see no reason why either set of claimants should have priority over the other. The contest does not arise between shareholders as such and

(1) 9 App. Cas. 519.
(2) 9 App. Cas. 857.
(3) 10 App. Cas. 354.
(4) 23 Ch. D. 440.

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creditors of the society. It arises between persons, each of whom claims that, so far as the point at present in dispute is concerned, certain moneys were his, and never ceased to be his, and are now represented by specific assets.

The only authorities to which I wish to make further reference specifically are *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (1), which I have already mentioned, and the subsequent decision in *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2) In the first of these cases this House laid down the principle, affirming the Court of Appeal, that where securities had been deposited with bankers for overdrafts which were ultra vires the bankers could not hold the securities. That seems to have been obviously right on the facts before the House. In the subsequent case the Court of Appeal took a further step, and held that the liquidator could recover from the bankers money paid to them by the society and applied in discharge of the money which they had lent to it by way of overdraft and so lent ultra vires. My Lords, I think that decision, which was not brought before this House for review, was wrong, under the circumstances of the case, in the absence of proof by the society, who by the fact of repayment had made an admission to the contrary effect, that the money advanced by the bankers had been lost and could not be treated as repaid. The society ought, in my opinion, to have been regarded, in the absence of evidence to this effect, as having simply returned to the bankers the latter's own money. For the same reason I entertain considerable doubt whether *Ex parte Watson* (3) was rightly decided.

I have examined the other authorities cited by the learned counsel on both sides in the course of the argument, but except in so far as I have already referred to these authorities I do not think it necessary to comment on them. For it is only on the points which I have mentioned that I find anything in what I am about to propose that is not really in harmony with them.

I move that the judgments of the Courts below be varied so as to give effect to a declaration that, subject to matters which have

(1) 9 App. Cas. 857. (2) 29 Ch. D. 902.
(3) 21 Q. B. D. 301.

already been settled by the consent of the parties, and subject to any application which may be made by any individual depositor or shareholder with a view of tracing his own money into any particular asset, and subject to the payment of all proper costs, charges, and expenses, the liquidator ought to proceed in distributing the remaining assets of the society between the depositors and the unadvanced shareholders on the principle of distributing them pari passu in proportion to the amounts properly credited to them respectively in the books of the society in respect of their advances at the date of the commencement of the winding-up, and that the case be remitted to the Court of first instance to apply this principle. As the appeal is one of an unusual character, and the litigation was essential for ascertaining the rights of all parties, I think we should not disturb the orders of the Courts below in regard to costs, and that the costs of all parties to this appeal should be paid out of the assets on the same footing as in the Courts below.

LORD DUNEDIN. My Lords, the facts of this case admit of being stated with extreme brevity. The Birkbeck Permanent Benefit Building Society, established in 1851 under the Building Societies Act of 1836, and having for its proper object the usual purposes of a building society, started and developed a banking business. On June 20, 1911, a winding-up order was pronounced. The outside creditors, to use a convenient term, were inconsiderable in number and value, and have been paid. There remain the claims of the bank customers or depositors and the shareholders. The exact figures are not available, but an approximate idea may be gathered from the balance-sheet of March 31, 1910, from which it appears that, in rough figures, the claims of the shareholders represented a little over one million pounds, those of the depositors $10\frac{3}{4}$ millions.

The shareholders are divided into two classes, A and B. The A shareholders made an arrangement with the depositors, and accordingly no question arises in respect of them. The B shareholders elected to stand on their legal rights. For the purposes of this case it is enough to describe the B shareholders in the terms which have become familiar through cases decided in your

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Lordships' House as unadvanced shareholders, who had not at the date of the winding-up given notice of withdrawal.

On June 30, 1911, the liquidator, by summons directed against persons representative of each class of claimants, asked for directions from the Court as to how the assets were to be applied. The assets were not sufficient to pay all claimants in full, but they were more than sufficient to pay the outside creditors and the shareholders. This summons after certain amendments was finally disposed of by an order of Neville J. of November 6, 1911. By this time the arrangement already mentioned between the A shareholders and the depositors had been come to. The order ranked the claimants and directed the assets of the society to be distributed as follows:—1. Costs of winding-up, including costs of scheme of arrangement between A shareholders and depositors. 2. Payment of outside creditors. 3. Payment to unadvanced members of all sums due, including interest and bonus. 4. Balance to depositors in proportion to sums at their credit.

This order has the effect, so far as the shareholders are concerned, of paying them in full. Against this order an appeal was taken and the order was affirmed by the Court of Appeal, Fletcher Moulton L.J. dissenting. Appeal has now been taken to your Lordships' House.

I do not propose to occupy your Lordships' time by discussing the question of whether the accepting of the depositors' money on a contract to repay was ultra vires. I think it clearly was ultra vires, and I agree with the learned judges of the Court of Appeal in the reasons they give for so holding.

The order as made is admittedly made on the authority of the order made by the Court of Appeal in the *Guardian Case.* (1) In itself the order obtains but scant praise from the learned judges who felt bound to pronounce it. The Master of the Rolls says that the *Guardian* order is binding upon him, but adds: "I feel a difficulty in discovering the principle on which it was based. It seems to me a rough and ready tracing judgment, illogical, but possessing the merit of attempting to do partial justice to the lenders." Buckley L.J. explains this illogicality in a very pertinent passage which I need not quote.

(1) 23 Ch. D. 440.

Apart from the fact that the *Guardian* order was framed by eminent judges—Sir George Jessel, Cotton and Bowen L.JJ.—it seems to me that its authority is somewhat scant, and, in particular, that there is no possibility of saying it has in any way received the approval of your Lordships' House. I should like to make this clear by a brief examination of the *Guardian Case*. (1) In the *Guardian Case* (1) there were two sets of questions—one as to the position of the lenders of money, the other as to the position of certain paid-up preference shareholders who had taken shares under a certain rule 32 of the society. The society in that case had by its rules a power to borrow without any limit as to extent.

The Court of Appeal held that a power to borrow without limitation as to amount was ultra vires; that consequently the lender of money had no legal or equitable claim of debt against the society; and they then made the order in question. As in question with the other shareholders they admitted the claim of the preference shareholders, but this—although valuable from another point of view in the discussion of these matters—is for the moment beside the question. The ranking under the order, therefore, was, first, outside creditors; second, shareholders; third, balance to lenders of money. The case was taken to your Lordships' House on two points—by the lenders of money as against the order postponing them, and by the ordinary shareholders as against the preference shareholders. Their Lordships in this House held that the Court of Appeal was wrong in holding that a power to borrow was ultra vires because unlimited; and no question being raised as to the borrowing having been for anything but legitimate objects of the society, the result was that the lenders became ordinary creditors, and as such ranked before all shareholders. As regards the preference shareholders, they affirmed the Court of Appeal.

Now, it appears plainly from this that the result of this was entirely to sweep away the order—not upon an expressed opinion that the order was itself wrong, but because the House affirmed the true facts to be such as to make the order inapplicable to the facts of the case. Consequently this House had really

(1) 23 Ch. D. 440.

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no opportunity of considering whether the order itself was right.

It was strenuously contended, however, at your Lordships' Bar, that the *Guardian* order was at least inferentially approved by the House in the subsequent, but nearly contemporaneous, case of *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*. (1) This is, I think, a misconception of the case. In that case a bank had made advances to the society upon deposit of securities as in ordinary bankers' practice, the securities being held by the bank to meet the overdraft. The suit was one at the instance of the liquidator of the society to recover the securities. The Court of Appeal held that the overdraft was a borrowing and was ultra vires, but said that if the bank could shew that the moneys paid upon the overdraft, or any part of them, had been expended in paying the just debts of the society, the bank would pro tanto be entitled to the benefit of the securities. The bank appealed. The liquidator presented no cross-appeal. This House held that the decision of the Court of Appeal was right in so far as it held that an overdraft was a borrowing and was ultra vires, with the resulting consequence that the bank could not hold the securities in respect in contract.

As regards the equity which was conceded to them by the order, they pointed out that no appeal was made against that order. Now, it will be observed that this case dealt with the retention of the securities alone; and the moment that contract was gone the right to the securities was gone; for to hold them it was necessary to hold them against all the world, i.e., against the ordinary creditors of the society. But the question was not raised, and could not be raised in that litigation, of what would be the fate of a claim at the instance of the bank against the general funds in the liquidation, and if that claim was made, what would be its ranking or position as in a question with shareholders. This is clear from the mere statement of the case. But it was clearly seen by Lord Watson, who in the course of his judgment expressed himself as follows (2): "If it were possible, in the present suit, to determine the whole questions which have arisen, or may yet

(1) 9 App. Cas. 857. (2) 9 App. Cas. at p. 871.

arise, between the parties in regard to these advances by way of overdraft, your Lordships would have many important questions to consider. But the sole object of these proceedings at the instance of the liquidators is to recover certain assets of the society, which are held by the appellants, in security of the advances made by them."

I therefore come to the conclusion that not only is the *Guardian* order not binding on this House, but that it does not bear with it any evidence that the question in its broad aspect was very carefully argued.

Now I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A. Where there is contract the solution is according to the contract, or you might say the position truly does not arise. Such are the cases of a bailment of a chattel or of a loan of money. But there are many cases where the position does arise and where there is no contract.

The case of a chattel is easy: A shopkeeper delivers an article at the house of B. in mistake for the house of A. An action would lie against B. for restitution. Such an action could easily be founded on the right of property. To use the Roman phraseology, there would be a jus in re. And where there was a jus in re there would not be, I take it, any difficulty in finding a form of common law action to fit the situation. But the moment you come to deal with what in Roman phraseology is called a fungible, and especially when you deal with money, then the jus in re may disappear, and with it the appropriateness of such common law action. The familiar case is the paying of money by A. to B. under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received.

I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity. My noble and learned friend Lord Sumner, in his

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opinion, which I have had the advantage of seeing, has conclusively shewn that it was not. But being a legal form, it does not admit, in spite of Lord Mansfield's dictum that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity. What concerns my view, however, is only this, that it is a contrivance which is introduced to meet an equitable idea, which idea is a wider idea than that expressed by the proposition that when there is a jus in re an action will lie, and when there is not such a jus it will not. This follows from the undoubted fact that where money is in question under modern conditions (by which I mean not put into bags or a stocking), there never will be a jus in re, there can at most be only a jus ad rem.

Viewing as I do the equity as based on inherent ideas of justice, it is, I think, very instructive to see how it is dealt with in other systems. I therefore make no apology for going to the Roman law, not as an authority, for such it is not, but as instructive as to how these matters may be dealt with, and as suggestive, as I shall afterwards shew, as to the true answer to the difficulties of the present case. The English common law has various actions which, under a classification which I understand to be really one of modern growth, are divided into actions in respect of contract and of tort. But in the Roman law the actions covering the same field are actions ex contractu and quasi ex contractu, actions ex delicto and quasi ex delicto. The class we are dealing with are obviously actions quasi ex contractu. Accordingly we find in the case of a chattel that while the actio commodati covered the case where there was a contract, i.e., a bailment, there was also an actio utilis where there was no contract. And coming to the case of money, while mutuum was proper loan, pro-mutuum covered the cases where money was had and received without contract, and a special form of action for the common case of the payment of a supposed but non-existing debt was known as condictio indebiti. Now, the English law, having no quasi contracts, got over the difficulty in such cases as the action for money had and received by the fiction of a contract.

It is, I think, obvious that the distinction between the fiction

of a real contract on the one hand, and the existence of a quasi contract on the other, is a distinction of a most metaphysical description. Both systems, at any rate in the case of money paid under a mistake in fact, recognize the obligation to repay where there is no jus in re. Both systems, I think, recognize the equitable rule, and proceed to carry it out according to the forms of their own development.

Now, that there is an obligation to restore, binding the defendant to pay in an action for money had and received, does not, I think, admit of doubt. The result is that it is a real debt, and as such entitled to take its place along with the debts of all proper creditors. To put an example. Suppose a sum of money was paid by A. to the credit of B. at his bankers, under the mistaken idea that a debt was due. Suppose that the next day, before A. had discovered the mistake, B. drew out the whole balance at his credit and spent the cash, and went bankrupt the same day. Can it be doubted that A. would have a claim in B.'s bankruptcy which would rank equally with all B.'s ordinary creditors?

Up to this time I have been putting cases where the recipient of the money does not receive it under an ultra vires contract. Let me now examine the position where the money is received under a contract to repay and where that contract is found to be ultra vires. That there can be no resulting proper contractual obligation is clear from the decisions of this House in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) and *Wenlock* v. *River Dee Co.* (2) It is here that the difficulty comes in in extending the action for money had and received to such a case. For, in the first place, if that action lay it would have the effect of bringing in A., who has, ex hypothesi, no binding contract to urge against B., pari passu with the ordinary creditors of B. who have got binding contracts; and in the second, how is it possible to say that there is a fictional contract which is binding in circumstances in which a real contract is not binding? My Lords, I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of common law actions is to handle periculosæ plenum opus aleæ. But to the best of

(1) L. R. 7 H. L. 653. (2) 10 App. Cas. 354.

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my comprehension, and notwithstanding the case of *Phœnix Life Assurance Co.* (1), I have come to the conclusion that the action for money had and received cannot be stretched to meet the situation.

It is not, however, necesary that the claim should be one capable of being made good by action at law. It will suffice if there is an equitable remedy.

Precisely the same difficulty was felt and met in the Roman law. True, there was then no doctrine of ultra vires in the modern sense of the word. But after all the only effect of the doctrine of ultra vires is to render contracts which are ultra vires a nullity. You cannot have more than a nullity, and such a nullity was equally found in the Roman law in the case of the contracts of pupils, who were totally incapable of contracting. Now, the Roman law met the situation by recognizing that there was the super-eminent equity with which I started, and proceeded to apply it, while giving full effect to the doctrine of there being no contract. The super-eminent equity was expressed by the Roman jurists in the brocard nemo debet locupletari jactura aliena. When, therefore, the advance was made to the pupil, there was no longer, as in the case of the ordinary person, an obligation to restore—a debt taking its place along with other debts—but the pupil was bound to give up in quantum locupletior; that is to say, to give up the superfluity which he was possessing. But only a superfluity—that is to say, something which if he kept would be pure gain to him. I cite authority for what I have said:—

Dig. 13.6. "Commodati vel contra":—

"1 (Ulpian). Impuberes commodati actione non tenentur quoniam nec constitit commodatum in pupilli persona sine tutoris auctoritate, usque adeo, ut, etiamsi pubes factus dolum aut culpam admiserit, hac actione non tenetur, quia ab initio non constitit." (Cf. the doctrine that an ultra vires contract of the company cannot be ratified even by all the members.)

"3 (Ulpian). Sed mihi videtur, si locupletior pupillus factus sit, dandam utilem commodati actionem secundum divi Pii rescriptum."

(1) 2 J. & H. 441.

Dig. 26.8. "De auctoritate et consensu tutorum et curatorum" :—

"5 (Ulpian). Pupillus obligari tutori eo auctore non potest. . . . . Sed et cum tutor mutuam pecuniam pupillo dederit vel ab eo stipuletur, non erit obligatus tutori: naturaliter tamen obligabitur in quantum locupletior factus est: nam in pupillum non tantum tutori verum cuivis actionem, in quantum locupletior factus est, dandam divus Pius rescripsit."

Pothier, the great French jurist, took the same kind of view. In his "Traité des obligations," after dealing with contracts, he goes on to consider "Des autres causes des obligations," and he puts first in this category quasi contracts. On these he comments as follows :—

"Sec. 114. Dans les contrats, c'est le consentement des parties contractantes qui produit l'obligation ; dans les quasi contrats, il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation, en rendant obligatoire le fait d'où elle résulte."

"115. Toutes personnes, même les enfants et les insensés, qui ne sont pas capables de consentement, peuvent par le quasi contrat qui résulte du fait d'un autre, être obligées envers lui et l'obliger envers elles : car ce n'est pas le consentement qui forme ces obligations, et elles se contractent par le fait d'un autre, sans aucun fait de notre part."

I have made these citations to shew that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract. Is English equity to retire defeated from the task which other systems of equity have conquered? Let us for a moment examine what the argument on the other side is. There being no contract, it is impossible, it is said, to have any obligation on the part of the society to restore what it has taken from the depositors. The only right of the depositors is a right to vindicate property; or, in other words, when you have a jus in re you can enforce it; but if the thing has so disappeared that a jus in re is no longer to be found (and this must practically always be so in the case of money), then your remedy is gone. The sole relief which equity can give is that if you can shew that

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your money has paid a just debt, in that case you shall have action. This comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban. In the words of technical equity it is unconscionable.

The appalling result in this very case would be that the society's shareholders having got proceeds of the depositors' money in the form of investments, so that each individual depositor is utterly unable to trace his money, are enriched to the extent of some 500 per cent. I am aware that the order under review shrinking from that result provides that when the shareholders get 20*s.* in the pound the rest may go to the depositors. But as to that there is to my mind no possible answer to the terse and inexorable logic of Buckley L.J. Even as it is the result is that illegitimate banking guarantees the shareholders 20*s.* in the pound.

But further, the whole strength of this argument lies in the idea that the jus in re represents the depositors' only right: that there can be no obligation on the other side at all. It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a jus in re, for you cannot have a jus in re in currency. It shews that both an action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

It is the case that the common law, as I have already said, works by means of a fiction which becomes inapplicable when the money has been received under an ultra vires contract. All, therefore, that is left to it is to vindicate in forma specifica, and its forms of action fail when the thing can no longer be identified. Equity—I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that

situation? I think not. I think it can always, in the exercise of the same jurisdiction, help the common law by tracing, and can say that if the proceeds of property can be shewn to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form. To do this is to give full effect to the doctrine of ultra vires—for the party receiving is not ordered to pay as a debt the equivalent of what he originally got, but ordered merely to surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without.

It, therefore, in each case becomes a question of evidence. Now that the society, in the present case, has got a superfluity is obvious. The assets, shrunk as they are owing to the fall in the value of investments, are still far beyond all moneys contributed by the shareholders. But what is the measure of the superfluity? The outside creditors here were actually paid, because their claims were inconsiderable. In my judgment, they were rightly paid, under the circumstances of the actual case, and had they not been, they would stand, after expenses of the liquidation, as first in the ranking. For, in a question with shareholders, we are told that they were debts of a character which the directors had a power to make. And in a question with the depositors, they were incurred in a business, illegally carried on no doubt, as for the society, but yet one which the depositors had been willing that the directors should carry on. Now, what is the position of the shareholders? I take it to be clear that the shareholders are not creditors of the society, but are merely the persons who are entitled on a winding-up to share the assets of the society among them. This is, I think, quite settled by the decision of your Lordships' House in the case of *Walton* v. *Edge* (1), where an unadvanced member who had given notice of withdrawal was held entitled in the liquidation to be paid in full before his fellow unadvanced members who had given no such notice.

The position, therefore, comes to this. The shareholders are entitled to share among them the proper assets of the society.

(1) 10 App. Cas. 33.

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But they are not entitled to be made rich at the expense of the depositors, by swelling the assets of the society by means of the proceeds of moneys which they themselves never contributed. There is a mixed mass of assets as to the precise composition of which as to source it is impossible to pronounce. Had the assets never shrunk there would be enough to pay both in full. But they have shrunk, and some one must bear the loss.

Now, there are certain situations, of which *Hallett's Case* (1) is an example, where the one sharing party has a right to say to the other, It is not in your mouth to say that the assets are not all mine, to the extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other. It is a mere question of evidence. What has happened is truly this. The directors of the society have taken the moneys of the shareholders which they had a right to receive, and the moneys of the depositors which they had not, and mixed them so that they cannot be discriminated from each other, and have put them, so to speak, in the society's strong-box, where the mixed mass is found by the liquidator. It is here, and here only, that I differ from my noble and learned friend, Lord Moulton, in his dissenting judgment in the Court below—a judgment which really follows the extremely able judgment of Bristowe, V.-C. of the County Palatine Court of Lancaster, in the *Guardian Case* sub nomine *Crace-Calvert's Case.* (2) There being no direct evidence, the only equitable means is to let each party bear the shrinkage proportionately to the amount originally contributed, and this is the judgment of my noble and learned friend on the woolsack, in which I concur.

I wish to remark, in conclusion, that it seems to me that this line of reasoning gives full effect to the doctrine of ultra vires, even in the somewhat rigid form in which it has been adopted by your Lordships' House in *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (3) To go further, as the respondents' argument seeks to do, is, I think, to run the doctrine mad. It was a doctrine which was introduced in order to let societies keep their own money, not to appropriate other people's.

(1) 13 Ch. D. 696.
(2) 23 Ch. D. at p. 444, n.; nom. *Calvert's* ca. on appeal, at p. 445.
(3) L. R. 7 H. L. 653.

I have dealt with the whole matter rather on principle than on authority. But I ought to say that I concur with the Lord Chancellor in thinking that the case of the *Blackburn Society* in 29 Ch. D. 902 was wrongly decided, and for the reason he gives; and that I agree with Fletcher Moulton L.J. in thinking that the decision of this House in *Murray* v. *Scott* (1), being the second question in the *Guardian Case* (2), is really an affirmation of the principle that there may be an equity when there is no contract, for the contract under which the 30*l.* shares were issued before the amendment of rule 32 was made was null and void, the rule not having then been certified by the certifying barrister.

Lord Parker of Waddington. My Lords, the Birkbeck Permanent Benefit Building Society is an association formed under and regulated by the statute 6 & 7 Will. 4, c. 32. It is not incorporated but acts through its directors, and acquires and holds property in the names of the trustees. Its objects are defined by its rules and do not, and, indeed, having regard to the statute, could not properly, include the carrying on of the business of bankers. It was, therefore, ultra vires for the society to carry on a banking business. Nevertheless for many years prior to its liquidation its directors and agents, affecting to act on its behalf, had carried on an extensive banking business popularly known as the Birkbeck Bank, and in the course of such business had received many millions of pounds on deposit or current accounts. Moneys so received are in contemplation of law borrowed moneys, and although the society had under its rules power to borrow for the purposes of its legitimate business, it, of course, had no power to borrow for purposes which were ultra vires. It is reasonably clear, having regard to the documents in evidence, that all those persons from whom the directors and agents of the society received money on deposit or current account must have been aware that the borrowing thus constituted was borrowing in the normal course and for the purposes of a banking business and not for the legitimate purposes of the society. None of such persons, therefore, can rely on the borrowing powers conferred by the society's rules.

(1) 9 App. Cas. 519. (2) 23 Ch. D. 440.

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It has been settled in the cases of *National Permanent Benefit Building Society* (1), *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2), and *Wenlock* v. *River Dee Co.* (3) that an ultra vires borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make. At the same time there seems to be nothing in those decisions which would bind the House, if they were considering whether an action would lie in law or in equity to recover money paid under any ultra vires contract which was not a contract of borrowing; for example, money paid to a company or association for the purchase of land which the company had no power to sell and the sale of which was therefore void, or money paid to the company or association by way of subscription for shares which it had no power to issue. In such cases the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the ultra vires contract. It will therefore be well to postpone consideration of such cases as the *Phœnix Life Assurance Co.* (4) and *Flood* v. *Irish Provident Assurance Co.* (5) till the question actually arises.

Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows: First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether

(1) L. R. 5 Ch. 309.
(2) 22 Ch. D. 61; 9 App. Cas. 857.
(3) 10 App. Cas. 354.
(4) 2 J. & H. 441.
(5) 46 Ir. L. T. 214.

the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied. There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. See the case of *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (1), the case of *Wenlock* v. *River Dee Co.* (2), and the case of *Wrexham, Mold and Connah's Quay Ry. Co.* (3) It is still open to your Lordships' House to adopt either view, should the question actually come up for determination.

Secondly, it appears to be also well settled that the lender in an ultra vires loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through an agent be party to an ultra vires act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender.

At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the

(1) 22 Ch. D. 61; 9 App. Cas. 857. (2) 10 App. Cas. 354.
(3) [1898] 2 Ch. 663; [1899] 1 Ch. 440.

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misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognized as such by the common law.

The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *In re Hallett's Estate* (1) by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case, this principle was held applicable when the trust money had been paid into the trustee's banking account. I will add two further illustrations which have some bearing on the present case. Suppose the property is acquired by means of money, part of which belongs to one owner and part to another, the purchaser being in a fiduciary relationship to both. Clearly each owner has an equal equity. Each is entitled to a charge on the property for his own money, and neither can claim priority over the other. It follows that their charges must rank pari passu according to their respective amounts. Further, I think that as against the fiduciary agent they could by agreement claim to take the property itself, in which case they would become tenants in common in shares proportioned to amounts for which either could claim a charge. Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity, he would be in exactly the same position as the fiduciary agent, and could not, therefore, assert any interest in the property until

(1) 13 Ch. D. 696.

the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.

It remains to mention the case of *In re Guardian Permanent Benefit Building Society* (*Crace-Calvert's Case*) (1), which has in the present case been followed by Neville J. and the Court of Appeal. It is worth while to call attention to the facts of this case, which differ in some important particulars from the facts of the case your Lordships have to decide. There the society was, like the society in the present case, formed under and regulated by the Act of 6 & 7 Will. 4, c. 32, and, according to the rules, had an unlimited power of borrowing money when required for its legitimate purposes. The Court of Appeal first decided that such an unlimited power to borrow was void, so that the society had in effect no power to borrow at all, a decision subsequently reversed in this House. (2)

The directors of the society had affected to borrow money from various lenders, but no lender was able to prove that his money had gone in discharge of any legitimate indebtedness of the society, or to trace his money into any particular asset of the society. Part of it had been applied in paying off loans previously contracted and the remainder, together with the loans so paid off, had in some way or other been used for the legitimate purposes of the society and found its way into the society's assets. The society was in liquidation, and it was treated by Sir George Jessel as fully established that its assets had been increased by, and to a large though undefined extent represented, the borrowed moneys. He therefore held that after paying thereout the costs of the liquidation and all debts and everything to which the members were entitled by way of return of capital interest and bonus, the surplus ought, "on the plainest principles of equity," to be returned to the people who advanced the money.

No doubt at first sight it is difficult to be certain as to the

(1) 23 Ch. D. 440. (2) 9 App. Cas. 519.

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principles of equity to which Sir George Jessel referred. But I think the difficulty may be solved by disentangling the equity itself from the directions by means of which the Court endeavoured to give effect to it. The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by, and in fact still represented, the borrowed money. It would be inequitable for the society to take advantage of the misapplication by its agents of money belonging to others and held by them in a fiduciary capacity. In other words, it was the same equity as that on which a tracing order is based. I cannot, however, disguise from myself that the directions given by the Court with the object of working out this equity are open to considerable criticism, at any rate if they be treated as proper to be given in every case and not depending on the particular facts then before the Court.

Suppose that when the moneys were advanced the assets of the society were insufficient to pay the creditors of the society in full, or to pay anything to the contributories, but that, by means of the ultra vires loans, such assets had at the date of the winding-up been so increased that both creditors and contributories could be paid in full, the creditors and contributories remaining the same. Would it be in accordance with equity and good conscience that these creditors or contributories should claim to be paid in full? I cannot think that it would. It seems to me that in equity and good conscience the amount of increase in the assets due to the ultra vires borrowings ought to be restored to the lenders. Neither creditors nor contributories ought in equity to be allowed to retain an advantage derived by reason of the misapplication by the society's agents of moneys which were in the position of trust moneys. Counsel sought to explain the *Crace-Calvert Case* (1) in the following way. It was clear, they put it, that the money of the ultra vires lenders, or at any rate some part of it (the exact amount being unascertained), was in the mass of assets in the hands of the liquidator. If the legal claims of all persons having any possible claim on the assets were first satisfied, what then remained would clearly

(1) 23 Ch. D. 445.

represent the borrowed money. This money would, in fact, be identified as the lenders' money not by any positive evidence but by a process of exclusion. This explanation fails in at least one important respect. The legal claims of the society's members were not confined to payment of the principal of their shares with interest and bonus. The members were legally entitled to all the assets, except such part thereof as the lenders could identify as belonging in equity to them, subject, of course, to the claims of the society's creditors. Logically, therefore, it would be impossible to arrive at what in equity belonged to the lenders by first satisfying the legal claims of the creditors and members. It was said that in the *Crace-Calvert Case* (1) there were admittedly no profits; but why, if this be assumed, should the members be entitled to interest or bonus? It seems to me that the actual directions given in that case must be considered merely as a rough and ready way of ascertaining in the particular case before the Court the extent to which the assets had been increased by and represented this borrowed money, and not as capable of logical justification.

If the Court had, as it might have done, directed an inquiry on the point, material facts not before the Court might have been disclosed. It might have been shewn that the debts due to the ordinary creditors had really been incurred in preserving the bulk of assets in which the shareholders and ultra vires lenders were alike interested, in which case it might be equitable that these debts should be first paid out of the fund. On the other hand, it might have been shewn that these debts were incurred before the ultra vires borrowing, in which case I cannot at present see how the creditors could claim to be in a better position because of the ultra vires borrowing. And again, the true facts with regard to profits might have come out. The answer to the inquiry would have depended largely on the facts put in evidence, the question of principle only would, I think, have [illegible]. Could the society be considered as having itself [illegible] to any breach of fiduciary duty so as to preclude it [illegible] asserting any interest in the assets, until the ultra vires [illegible] had been fully repaid thereout? Or was the society in the

(1) 23 Ch. D. 445.

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position of a person who had innocently received from a fiduciary agent money belonging to another and invested it with money of his own? My present opinion is that the first of these questions should be answered in the negative and the latter in the affirmative, in which case the society and ultra vires lenders would, as against the assets, rank pari passu and without any priority the one over the other. It is, however, unnecessary to decide this point, because the facts of the *Crace-Calvert Case* (1) are distinguishable from the facts of the case now before your Lordships.

My Lords, it is important to observe that in the *Crace-Calvert Case* (1) the money was borrowed for and applied to the legitimate purposes of the society, the loan being ultra vires because the society, according to the Court of Appeal, had no power to borrow at all even for its legitimate purposes. In the present case the society had power to borrow for its legitimate purposes, and the borrowing in question is ultra vires only because, to the knowledge of the lenders, it was for a purpose not authorized by the society's constitution. This distinction is, I think, of considerable importance. In the first place, if the agents of a society, having power to borrow, borrow money intending, to the knowledge of the lenders, to apply it for an illegitimate purpose, but in fact apply it for the legitimate purposes of the society, there seems no reason, either in law or in [illegible] the loan to the extent to which it is so utilized should not be [illegible] as valid. In the next place, if the money be in fact utilized for the illegitimate purpose for which it is borrowed, say the carrying on of an ultra vires banking business, to whom does this business belong? Whose are the assets and whose are the liabilities? The society cannot be a party to any transaction or series of transactions not within its powers. The society, therefore, is neither entitled to the assets nor subject to the liabilities acquired or incurred in the business. No doubt, if the business is a financial success, the directors or agents who carried it on would have to account to the society for the profits or surplus assets, for equity will not allow a director or other agent to make a profit out of his directorship or agency. It is quite

(1) 23 Ch. D. 445.

clear, however, that the society could not be entitled to anything except the profits or surplus. It could not claim to be entitled to the assets of the business, and exempt from its liabilities on any plea of ultra vires, and for this purpose the borrowed moneys would be a liability of the business.

But suppose that the illegitimate business is carried on in part only with the borrowed money and in part with money belonging to the society. Even in this case the business will not belong to the society, nor will the society be entitled to its assets or subject to its liabilities, any more than it would have been the case if the only money employed in the business had been the borrowed money. Further, the society's right in equity to take the assets subject to the liabilities if the business were successful would be similarly unaffected. But the fact that the society's own money had been employed by its directors or agents in an ultra vires business would entitle the society to an additional equity. It would be entitled, on the principles of *In re Hallett's Estate* (1), to follow the money as long as it or any property acquired by its means could be identified. In other words it would have exactly the same equities in this respect as the ultra vires lender, including the equity which in my opinion underlies the *Crace-Calvert Case.* (2) It follows from this that it would be entitled to take or claim a lien on any assets of the business acquired exclusively with its money, and to a lien or charge on any asset or mass of assets acquired partly only with its money, subject nevertheless to this, that if the ultra vires lender could establish a similar lien or charge, the two liens or charges would rank pari passu. Moreover, this right on the part of the society would not be affected by the question whether the business had been carried on at a profit or at a loss.

My Lords, the present case is not quite so simple as the one I have supposed for this reason. The legitimate business of the society included the making of loans to members to enable them to acquire houses or lands. Many such loans were, in fact, made, but it is impossible to say how far the money lent was the money of the society or the money of the ultra vires lenders. The question is whether these facts in any way affect the situation,

(1) 13 Ch. D. 696. (2) 23 Ch. D. 445.

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Of course, if the society could trace its own money into any of these loans the security for the loan would undoubtedly belong to the society, but no such tracing appears to be possible. And again, if any ultra vires lender could trace his money into any of these loans, he would not only be entitled to the security, but might claim to be a secured creditor of the society on the ground that the ultra vires borrowing was validated by the use of the money for purposes for which there was a valid borrowing power in the society, but no ultra vires lender can so trace his money. There does not appear to be any presumption of law as to whose money was utilized for the purposes of those loans. Moreover, the directors treated the loans in question as part of the banking business, and included them in the balance-sheet which was posted up in the bank premises and supplied to customers who asked for it. Under these circumstances I think the fact that those loans were within the legitimate purposes of the society cannot affect the situation in any way.

The case, therefore, presents itself in this way. Here is a mass of assets arising in the course of an ultra vires business carried on by the directors and agents of the society. There are, on the other hand, liabilities, how or for what purpose incurred is not in evidence. No one claims any interest in the assets except the ultra vires lenders, the members of the society and the creditors, in respect of the liabilities to which I have referred. The ultra vires lenders and the members are willing that these liabilities and the costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is left may be taken to represent in part the moneys of the ultra vires lenders and in part the moneys of the society wrongfully employed in the business. The equities of the ultra vires lenders and of the society are equal, and it follows that the remainder of the assets ought to be divided between the ultra vires lenders and the society rateably, according to the capital amount contributed by such lenders and the society respectively. This mode of distribution gives effect to all the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in the *Crace-Calvert Case* (1), for

(1) 23 Ch. D. 445.

there the business actually carried on was intra vires, and thus belonged to the society, except in so far as the ultra vires lenders could establish any equitable claim. It depends solely on the fact that the assets for distribution being assets not of a legitimate but an ultra vires business are not the assets of the society, except in so far as they can substantiate some equity to them, and that such equity as they have can arise only from an application of the same principles to which the ultra vires lenders are themselves entitled to have recourse.

My Lords, there are two further points which arose in the course of the argument before your Lordships' House and which I desire to mention. In the first place, there is the decision of the Court of Appeal in the case of *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (1) Speaking for myself, I am by no means satisfied that a statutory company or association whose agents have borrowed money on its behalf, though it has no power to borrow, can in no circumstances repay the loan. It may well be that if the money does not come into the coffers of such company or association, or, if so coming, it is subsequently lost, there may be no power of repayment. But if the money can be traced, or if the circumstances are such that if the society were in liquidation there would be an equity such as that to which effect was given in the *Crace-Calvert Case* (2), why should not the company or association repay the money so far as it is represented by assets in their hands? As at present advised, I see no reason why it should not; nor, indeed, am I satisfied that the equity to which effect is being given in this case is necessarily confined to a liquidation. It is, however, unnecessary for your Lordships to decide these points.

In the second place there is *Scott's Case* (3), which constitutes the basis of Fletcher Moulton L.J.'s dissenting judgment in the present case. With this judgment I find myself, in all respects except one, in substantial agreement. I agree that so far as the distributable assets represent the money of the ultra vires lenders they are not in equity the assets of the society. The distributable

(1) 29 Ch. D. 902. (2) 23 Ch. D. 445.
(3) 23 Ch. D. 453; 9 App. Cas. 523.

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assets must be purged to this extent before it can be ascertained what in equity belongs to the society. The point on which I differ is this. Whereas Fletcher Moulton L.J. was of opinion that the amount to which the assets must be purged is the amount of the moneys lent, I think the true view is that the amount to which the assets must be purged is the amount only to which they have been increased by and still represent the borrowed money. It is only in this connection that *Scott's Case* (1) requires consideration. My Lords, in *Scott's Case* (1) the society had issued 30*l.* preference shares which they had no power to issue, and received from the subscribers the full amount thereof. The society had subsequently obtained power to issue 1*l.* preference shares and had accepted a surrender of each 30*l.* preference share in consideration of the issue to the holder of thirty 1*l.* preference shares. It was held that though the latter transaction could not stand at law, yet the society were in equity bound to treat the subscribers either as holders of validly issued 1*l.* preference shares or as creditors for the amounts they had subscribed. It is clear that in either case they would, according to the actual decision in the *Crace-Calvert Case* (2), be paid before the ultra vires lenders got anything, so that the equity was not the Crace-Calvert equity.

The equity is, in the judgments of Sir George Jessel M.R. and Cotton and Bowen L.JJ., based upon the misrepresentation of the society's agent in that they had printed in the rules of the society a clause expressly empowering the issue of 30*l.* preference shares, though such clause had been disallowed by the barrister, and therefore did not in fact form part of such rules. The decision was affirmed by this House, Sir George Jessel's reasons being approved by Lord Blackburn. Now, undoubtedly if the agents of a society affect to borrow money in the course of a banking business, there is not only an express representation of authority, but an implied representation of (1.) a power to borrow, and (2.) a power to borrow for banking purposes, for without such powers the authority could not be given. Yet the same judges had just decided the *Crace-Calvert Case* (2), and clearly did not intend to go back on their decision.

(1) 23 Ch. D. 453; 9 App. Cas. 523. (2) 23 Ch. D. 445.

I can hardly think they intended to base their decision on the particular manner in which the misrepresentation had been made. It seems to follow, therefore, that in the case of an ultra vires borrowing, the nature of the transaction precluding, as it did, the creation of a debt at law or in equity, no such equity could, in their opinion, arise as that which they held to arise in *Scott's Case* (1), which was an ultra vires issue of shares. I doubt, therefore, whether *Scott's Case* (1) can be relied on as any authority in the present case, and if so relied on it is contrary to the *Crace-Calvert Case* (2) and other cases which decide that no debt can arise out of an ultra vires borrowing. It is to be observed that Cotton L.J. refers to the equity as arising not only if the ultra vires transaction is brought about by the misrepresentation, but if it be brought about by "the carelessness or otherwise" of the company's agents. In other words, he seems to me to be dealing with it simply as a case of total failure of consideration from whatever cause. I am not satisfied that total failure of consideration would not have afforded ample ground for the actual decision, and, as I have already said, there is nothing to preclude this House from deciding that, under the circumstances of *Scott's Case* (1), an action lay at law for money had and received.

My Lords, the appeal having in part succeeded and in part failed, I think the reasonable course would be that the costs of all parties should be treated as costs of the liquidation and paid out of the assets.

LORD SUMNER. My Lords, I agree that the whole banking business of the Birkbeck Society was ultra vires; that the banking contracts of loan, which ostensibly arose in the course of it, were void; that the funds, procured alike from shareholders investing in the building society business and the customers of the banking business, have been inextricably confused and have been indiscriminately employed in acquiring assets, which cannot now be attributed to the one branch rather than to the other; and that everybody concerned—customers, shareholders, and officers—must all be taken to have known of the legal invalidity both of the acquisition of the depositors' funds and of the

(1) 23 Ch. D. 453; 9 App. Cas. 523. (2) 23 Ch. D. 445.

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disposition of any funds in a banking business. Probably very few of them knew or suspected it in fact, but the knowledge that a banking business was being carried on was common to all, and all had notice of the rules. All must equally abide by the legal consequences of this invalidity.

The depositors' case has been put, first of all, as consisting in a right enforceable in a common law action. It is said that they paid their money under a mistake of fact, or for a consideration that has wholly failed, or that it has been had and received by the society to their use. My Lords, in my opinion no such actions could succeed. To hold otherwise would be indirectly to sanction an ultra vires borrowing. All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot de jure impute promises to repay, whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid.

To the other difficulties of such claims I will allude shortly. There was no mistake of fact. The facts were fully known so far as was material. The rules and objects of the society were accessible to all. The only mistake made was a mistake as to the law, or that mistake of conduct to which all of us are prone, of doing as others do and chancing the law.

There was no failure of consideration. As Bowen L.J. says in the *Guardian Case* (1), "Those who deal with a society which professes to have power to borrow have equal means of knowledge with the society itself of the statutory powers of the company; they are put, so to speak, upon inquiry whether the company really can borrow validly or not, and if they choose to lend their money to a company which cannot properly borrow it cannot be said there is a failure of consideration. The company has got their money, it is true, but they must be taken to have known what they bought, and to have been willing to pay their money on the chance."

Further, the depositors' money was not had and received by the society, but by its officers, and receipt is an essential: *Prince* v. *Oriental Bank Corporation*. (2) If it was ultra vires for the

(1) 23 Ch. D. at p. 470. (2) (1878) 3 App. Cas. 325.

society to take customers' accounts, that is, in the eye of the law, to borrow the money on its promise to repay, it was ultra vires for it to authorize its officers to do so on its behalf. The money—cheques, bills, and so forth—has no doubt reached the society's coffers, and thereafter has been dealt with as the depositors were willing and intended that it should be dealt with, and, so far as has appeared in this case, the officers of the society are not now chargeable. The society has the proceeds, or rather the liquidator has them, in that sense of possession which is necessary to found "tracing orders" and otherwise for the purpose of the winding-up, but it has not got them and there is no receipt of them in the sense which is necessary to raise the implication of a promise to repay that would bind the society.

In these straits, Lord Mansfield's celebrated account of the action of money had and received in *Moses* v. *Macferlan* (1) was of course relied upon. It was said that for any one to keep the depositors' money as against them would be unconscientious, while that they should get it back would be eminently ex æquo et bono, though it appeared also that conscience had nothing to say against payment of the depositors in full at the expense of the shareholders, though all alike must be deemed cognizant of the invalidity of the society's banking business. *Burges and Stock's Case* in *Phœnix Life Assurance Company's Liquidation* (2), which was relied on, is irrelevant if treated as a case of an intra vires borrowing of the amounts of the premiums in question, which seems to have been the ratio decidendi of Wood V.-C. If the decision is supposed to be that in every case where money is paid under a contract which proves to be ultra vires it may be recovered as upon a consideration that has wholly failed, I think it goes too far, for the reasons I have already given. There may have been special facts to justify such an opinion in that case, though I think not, for the effect of it must in any view have been to bind the society in fact to a contract which in law was not binding at all. The other cases cited seem to me insufficient to support the appellants' claim to any common law right. The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases, and

(1) 2 Burr. 1005.

(2) 2 J. & H. 441.

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although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellants now.

Resort was then had to equity, and, as I understood it, the argument was that the action for money had and received was founded on equity and good conscience, and imported a head of equity (apart altogether from its possibly too limited application at law), namely, that whenever it is ex æquo et bono for A. to repay money which he has received from B., and would be against conscience for A. to keep it, then B. has an equity to have A. decreed to repay it. For this again Lord Mansfield's authority in the same case was invoked.

My Lords, I cannot but think that Lord Mansfield's language has been completely misunderstood. Historically, the action for money had and received was not devised by the Court of Chancery, nor was it applied there either in form or in substance. It was a form of assumpsit, already old in Lord Mansfield's time, and his own citation of earlier actions of this sort should be enough to shew, if that were necessary, that he never thought otherwise. It was said to be a "liberal" action in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. The action has been described as "liberal" because "the party waives all torts, trespasses, and damages." (1) In and after Lord Mansfield's time its liberality in point of practice is shewn by the fact that the plaintiff declared with a minimum of particulars and the defendant pleaded the general issue, under which he could prove almost anything (see 2 Williams' Saunders, 120, Notes to *Chandler* v. *Vilett*; *Orton* v. *Butler* (2); *Owen* v. *Challis* (3)). No doubt it gave scope (at least in days when reported cases were less multitudinous than now) for decisions to meet what is called the "justice of the case." These features attracted Lord Mansfield, chafing already at the rigidity of the older forms of action, and emulous no doubt of the adaptability and growth which characterized the doctrines of equity in his time. He, and Buller J., spoke of the action in

(1) *Anon.* (1772) Lofft, 320. (2) (1822) 5 B. & Ald. 652.
(3) (1848) 17 L. J. (C.P.) 266.

somewhat varying terms from time to time (see *Weston* v. *Downes* (1); *Longchamp* v. *Kenny* (2); *Sadler* v. *Evans* (3); *Straton* v. *Rastall* (4)). Lord Mansfield, who in *Clarke* v. *Shee* (5) merely described the action as "a liberal action in the nature of a bill in equity," in *Towers* v. *Barrett* (6) says it is "founded on principles of eternal justice." In *Straton* v. *Rastall* (4) Buller J. says that "Of late years this Court has very properly extended the action for money had and received; it is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and that he could recover it in a Court of Equity." But the reported cases do not shew how, if at all, this obligation was enforced. I think it is evident that Lord Mansfield did not conceive himself to be deciding that this action was one in which the Courts of common law administered "an equity" in the sense in which it was understood in the Court of Chancery (see observations of Farwell L.J. in *Baylis* v. *Bishop of London* (7)), and the cases actually decided shew that the description of the action as being founded in the æquum et bonum is very far from being precise. Even the decision in *Moses* v. *Macferlan* (8), which has since been dissented from, for some time unsettled the law (see Smith's Leading Cases, Notes to *Marriot* v. *Hampton* (9)), and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice. *Crockford* v. *Winter* (10) and *Martin* v. *Morgan* (11) are instances, on the other hand, which shew that Lord Ellenborough and Dallas C.J. respectively understood that in that form of action the Court strove to do what was just and not to administer equity. With whatever complacency the Court

(1) (1778) 1 Doug. 23.
(2) (1779) 1 Doug. 137.
(3) (1766) 4 Burr. 1984.
(4) (1788) 2 T. R. 366.
(5) (1774) Cowp. 197.
(6) (1786) 1 T. R. 133.
(7) [1913] 1 Ch. 127.
(8) 2 Burr. 1005.
(9) (1797) 7 T. R. 269; 2 Sm. L. C. (11th ed.) 421.
(10) (1807) 1 Camp. 124.
(11) (1819) 1 Brod. & B. 289.

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of King's Bench might regard the views expressed in *Moses* v. *Macferlan* (1), protests were very early made against it in the Common Pleas (*Johnson* v. *Johnson* (2)), and in *Miller* v. *Atlee* (3) Pollock C.B. bluntly declared the notion that the action for money had and received was an equitable action to be "exploded," and Parke B., sitting by him, did not say him nay. This episode is reported only in 13 Jurist, but it smacks of truth. Since, then, allusions have been made from time to time to the connection between this cause of action and equity or the æquum et bonum (though they are not precisely the same things), for example, in *Smith* v. *Jones* (4), *Tregoning* v. *Attenborough* (5), *Rogers* v. *Ingham* (6), *Phillips* v. *London School Board* (7), and *Lodge* v. *National Union Investment Company* (8), but I take them all to be merely descriptive of the undoubtedly wide scope of this essentially common law action. There is now no ground left for suggesting as a recognizable "equity" the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer.

The appellants next submitted that even though the money of the depositors might not be repayable in full, the order made by Neville J., for convenience called the *Guardian* order (9), was inapplicable in the present case, and, indeed, that the judgment of the Court of Appeal in Mrs. Crace-Calvert's case in the *Guardian Permanent Benefit Building Society's Liquidation* (9) was wrong. My Lords, I think that in any case that order is not applicable in the case now before your Lordships. There the money was borrowed by the directors, and it does not appear that the shareholders as a body were in fact cognizant of the borrowing. Here the fact that a banking business was being carried on was a matter of notoriety and even of pride. There the money, when received, was applied to the legitimate purposes of a building society, and the only business carried on was that of a building society; here the money was applied on a very large scale for the purposes of the ultra vires banking branch;

(1) 2 Burr. 1005.
(2) (1802) 3 Bos. & P. 162, at p. 169.
(3) (1849) 3 Ex. 799; 13 Jur. 431.
(4) (1842) 1 Dowl. P. C. (N.S.) 526.
(5) (1830) 7 Bing. 97.
(6) (1876) 3 Ch. D. 351.
(7) [1898] 2 Q. B. 447, at p. 453.
(8) [1907] 1 Ch. 300, at p. 312.
(9) 23 Ch. D. 440.

here, further, the shareholders' money, paid in respect of shares they held, was very largely applied in the same way. For the reasons pointed out by my noble and learned friend, Lord Parker of Waddington, I think that this substantially and sufficiently differentiates Mrs. Crace-Calvert's case.

My Lords, the majority of the Court of Appeal, while deeming themselves bound to follow and apply the *Guardian Case* (1), did not conceal their doubts of its correctness. Should that case come before your Lordships' House directly for review, as it clearly is open to review, I confess that I should be slow in arriving at the conclusion that I could not assent to the decision of so strong a Court. In the *Guardian Case* (1) assets were found, to which no doubt Mrs. Calvert's money had contributed, but which were employed in the business legitimately carried on by the society. Prima facie they were the society's assets, and out of them the unadvanced shareholders were by the rules entitled to be repaid the amount of their shares severally. So much at least was their legal right. No one could shew what particular assets were the fruits of the borrowed money. Against this legal right, who had an equity that should prevail? Not at any rate the ultra vires lenders, who had no legal right at all, who had certainly lent their money in order that it might be invested in the building society business, and who also, in the view of the Court, which I think was wrong, were to be deemed in law to have lent on the chance (doubtless, as they thought, without risk) that all would be well and that the contract would be performed. I think the order made was rightly described by Cozens-Hardy M.R. as a rough tracing order. A ruthless logic would have given all to the shareholders, principal, interest, bonus, and surplus, but this would have held the shareholders entitled to approbate the gains, while bound in law to reprobate the borrowing by which they were acquired. It is plain that Jessel M.R. thought that, by giving what was given to the shareholders, the Court had eliminated all but the proceeds of the ultra vires borrowing, and I should hesitate to reject this view, if the only alternative were to find the shareholders entitled to everything, though I recognize that it was not more than approximately exact.

(1) 23 Ch. D. 440.

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My Lords, I think the present case must be decided upon equitable principles upon which there is no direct authority. Of equitable principles I hesitate to speak confidently, for did not Jessel M.R. say that the principle of the *Guardian* order, which has given so much trouble, was one of the plainest of them? Yet, perhaps I may say of myself, what Thesiger L.J. said of Bramwell B. in *Hallett's Case* (1), that "even to the mind of a common law judge the principles of law which have been applied now for some time in equity have been made perfectly plain." What ought to be done I think is clear; the only difficulty is how to describe the principle and how to affiliate it to other legal or equitable rules.

The question is one of administration. The liquidator, an officer of the Court, who has to discharge himself of the assets that have come to his hands, asks for directions, and, after hearing all parties concerned, the Court has the right and the duty to direct him how to distribute all the assets. No part of them can remain undistributed as res nullius. No one has ventured to argue before your Lordships that the shareholders take everything, to the exclusion of the depositors, and so make a huge windfall. In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognized rule of law or equity be disregarded. In this case neither the shareholders nor the depositors have the better equity; the money of each has, with the consent of all, been indiscriminately applied in acquiring assets beyond as well as within the society's powers, the former in much the larger measure. The claims of each class are equal, and, I think, for the present purpose identical.

Analogous cases have been decided with regard to chattels. They differ, no doubt, because of the fact that the property in the chattels remained unchanged, though identification and even identity of the subject-matter of the property failed, whereas here, except as to currency, and even there only in a restricted sense, the term property, as we use that term of chattels, does not apply, and, at least as far as intention could do it, both depositors and shareholders had given up the right to call the money or its

1) 13 Ch. D., at p. 722.

proceeds their own, and had taken instead personal claims on the society. In *Buckley* v. *Gross* (1), where tallow in burning warehouses melted and ran down a sewer, and a stranger collected it, Blackburn J. says: "The tallow of the different owners was indeed mixed up into a molten mass, so that it might be difficult to apportion it among them; but I dissent from the doctrine that, because the property of different persons is confused together, that entitles a third party to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass." Again, *Spence* v. *Union Marine Insurance Co.* (2) is a case where cotton in bales belonging to different consignees was so damaged by sea perils that it arrived with marks obliterated and otherwise injured, and after delivery to the respective consignees of all that could be specifically identified as theirs, a mass of unidentifiable damaged cotton remained. There, as here, no doubt one bale, in fact, represented A.'s money and another B.'s; there, as here, all were depreciated, but probably not each in the same degree, but no one could say which bale was any particular person's property, or who, therefore, should bear the greater and who the less depreciation. The goods could not be treated as bona vacantia, they could not fall into the hands of the first person who reduced them into possession, and on principles and analogies derived from Roman law the Court treated the consignees as tenants in common of the unidentifiable cotton, in the proportion borne by the numbers originally shipped by them to the number remaining. This decision has never been questioned for nearly fifty years.

My Lords, I agree, without recapitulating reasons, that the principle on which *Hallett's Case* (3) is founded justifies an order allowing the appellants to follow the assets, not merely to the verge of actual identification, but even somewhat further in a case like the present, where after a process of exclusion only two classes or groups of persons, having equal claims, are left in and all superior claims have been eliminated. Tracing in a sense it is not, for we know that the money coming from A. went into one

(1) (1863) 3 B. & S. 566, at p. 574. (2) (1868) L. R. 3 C. P. 427.
(3) 13 Ch. D. 696.

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security and that coming from B. into another, and that the two securities did not probably depreciate exactly in the same percentage, and we know further that no one will ever know any more. Still I think this well within the "tracing" equity, and that among persons making up these two groups the principle of rateable division of the assets is sound. I agree in the decision proposed, both as to the order to be substituted for that of the Court of Appeal and as to the costs.

Order of the Court of Appeal and judgment of the Companies (Winding-up) Division of the High Court of Justice varied so as to give effect to a declaration that, subject to matters which have already been settled by the consent of the parties, and subject to any application which may be made by any individual depositor or shareholder, with a view of tracing his own money into any particular asset, and subject to the payment of all proper costs, charges, and expenses, the liquidator ought to proceed, in distributing the assets of the society between the depositors and the unadvanced shareholders, on the principle of distributing them pari passu in proportion to the amounts properly credited to them respectively in the books of the society at the date of the commencement of the winding up: Cause remitted back to the Companies (Winding-up) Division of the High Court of Justice to do therein as shall be just and consistent with this judgment: The costs of the appeal to this House to be paid out of the assets on the same footing as in the Court below.

Lords' Journals, February 12, 1914.

Solicitors for appellant: *Burton, Yeates & Hart.*

Solicitors for respondent Brougham: *Freshfields.*

Solicitors for respondent Ravenscroft: *Ashurst, Morris, Crisp & Co.*

Applied. EDLER *v.* AUERBACH
[1950] 1 K. B. 359

[HOUSE OF LORDS.]

NORTH WESTERN SALT COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ELECTROLYTIC ALKALI COMPANY, LIMITED . . . . . } RESPONDENTS.

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Contract—Restraint of Trade—Trade Combination—Public Policy—Illegality—Surrounding Circumstances—Evidence—Pleading.

Where an action is brought on a contract which is ex facie illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule, the Court will not entertain the question unless it is raised by the pleadings.

The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, i.e., agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at the plaintiff company's current selling price and were to be appointed distributors on the same terms as the company's other distributors. The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract. The defendants did not by their defence raise the issue of illegality, but they sought to rely on certain facts and documents admitted in evidence at the trial upon other issues as shewing that the agreement was illegal as against public policy:—

Held that, having regard to the form of the pleadings, the surrounding circumstances could not be looked at for the purpose of determining the illegality of the agreement, and that the agreement was not ex facie illegal.

Decision of the Court of Appeal [1913] 3 K. B. 422 reversed.

APPEAL from a decision of the Court of Appeal reversing a decision of Scrutton J. (1)

* *Present:* VISCOUNT HALDANE L.C., LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

(1) [1913] 3 K. B. 422.

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The following statement of facts is taken from the judgment of the Lord Chancellor.

" The appellant company are a combination of salt manufacturers, and they are alleged to include substantially the whole of the salt manufacturers in the north-west of England, and to have obtained the practical control of the inland market in England for the sale of vacuum salt, stoved and unstoved. Stoved salt is salt which is used for household purposes and which has been subjected to special drying processes to fit it for such purposes. Vacuum salt is salt, whether afterwards stoved or not, which has been prepared by a process in which the waste steam from the works is carried under the salt pans, instead of fires being put under these salt pans.

" The contract between the appellants and the respondents, who were salt manufacturers, was made on November 9, 1907. By its terms the respondents agreed to sell to the appellants 72,000 tons of vacuum salt, of which 12,000 were to be stoved salt. Delivery was to be spread over the four years between January 1, 1908, and December 31, 1911, in about equal monthly quantities. These quantities represented 18,000 tons a year, of which 3000 were to be of stoved salt, unless the respondents in November in any year exercised an option to deliver unstoved salt only in the following year. The price was to be 8*s*. a ton for both kinds of salt, delivered into trucks at the sellers' works or into craft at their canal wharf. Stoved salt was to be loaded in bags, to be provided by the buyers, but to be filled and stitched at the expense of the sellers. The sellers were to be free to manufacture other salt for their own use, but not for sale, excepting so much as was required to satisfy a certain current contract. The sellers were to have the option of repurchasing from the buyers the stoved vacuum salt manufactured by themselves to the extent of 3000 tons annually at the buyers' current prices. If the sellers made stoved vacuum salt they were to be elected distributors in respect of 3000 tons annually, on the same terms and conditions as the buyers' other distributors. The sellers agreed not to lease or sell any of their land during the contract for salt making or boring for brine for salt making, but they might sell brine for other purposes than salt making. They were to be free

to reduce or cease their making of salt. The agreement was to be taken as a settlement of all questions arising out of a previous agreement of August 25, 1906.

"There were, of course, other salt manufacturers, and these were also under contract to sell salt to the appellants, and they acted as distributors of salt for the appellants under an agreement for distribution, the terms of which did not substantially vary during the period covered by the contract sued on. The effect of these terms was that if the salt manufacturers exercised their option to repurchase the stoved salt, and then resold it, they would have to pay out of the price they received, not only the current selling prices, but certain amounts which they might receive for putting the salt into bags and stitching them, and the amount of these charges could be claimed by the appellants as additions to their current selling price. There were also loading and other charges, the amounts of which might be similarly claimed.

"The appellants' current price for table salt, apart from all additions,—the naked price as it was called—was fixed on March 30, 1908, at 18*s*., and the respondents intimated their exercise of the option to repurchase. Controversy arose as to the terms and effect of the option when exercised, and as to whether the respondents were bound to sign a distributors' agreement, and in what terms. Meantime the respondents began, in breach of their contract, to sell stoved salt to customers. They appear to have concealed these sales from the appellants. The latter, however, discovered what had been done and claimed damages.

"In the event the present action was brought. In their points of claim the appellants simply stated the contract of November 9, 1907, alleged breaches, and claimed damages. They set out particulars of the sales alleged to have been made in breach by the respondents, and stated the character of the dispute which had arisen as to the measure of damages. The respondents' points of defence were confined to a denial of the alleged breaches as regards the bulk of the stoved salt in question. The case made was that they had in substance repurchased and properly sold the stoved salt in question, and that they had duly paid or

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brought into Court all the money the appellants were entitled to. As to another and smaller quantity of the salt in controversy, they admitted sales in breach of contract, but disputed the measure and amount of the damages claimed, and they brought into Court sums which they alleged were sufficient to satisfy all proper claims. In their reply the appellants joined issue generally, and alleged that the respondents were only entitled to sell salt repurchased on the terms contained in the distributors' agreement, under which they ought, as a preliminary to such resale, to have lodged with the appellants the contracts for sale. This it was alleged that the respondents had not done, and the appellants further relied on certain inland conditions which were issued in accordance with the distributors' agreement, and with which it was said that the respondents had not complied.

"The respondents did not in their points of defence set up the invalidity or non-enforceability of the contract of November 9, 1907, and it was admitted at the Bar that it was through no slip, but after consideration, that this was not done. The only questions raised by the pleadings were, firstly, whether the respondents had not in substance repurchased under the option in the contract and then properly resold, and, secondly, as to the measure of damages.

"The action was tried in the Commercial Court before Scrutton J. The learned counsel for the respondents, in the course of cross-examining one of the appellants' witnesses, raised the point as to the legality of the agreement. Counsel for the appellants objected that no such point had been pleaded. Scrutton J. sustained the objection. He held that unless illegality appeared on the face of the plaintiffs' case the point could not be put in cross-examination, having regard to the fact that no such point was raised by the pleadings, pursuant to what was required by the Rules of the Supreme Court. He refused leave to amend, but he said that if, after hearing the plaintiffs' case, he was satisfied that the claim was as matter of law illegal or unenforceable, he would be bound to take judicial notice of this and to disallow the claim. He finally gave a judgment for the plaintiffs on the question of validity, and for the rest,

confined it to the other questions which I have indicated. It dealt mainly with the measure of damages.

"The case went to the Court of Appeal, where a majority of the Court, consisting of Vaughan Williams and Farwell L.JJ., held that the contract was in restraint of trade and bad, and that the action should be dismissed with costs. Kennedy L.J. dissented. The Court was willing to grant a new trial, if both parties desired it, in which further evidence as to the circumstances could be brought forward, but the defendants elected to take a final judgment. The majority of the learned judges in the Court of Appeal held that the contract sued on must be read in connection with the distributors' agreement, and that this agreement must be read as connected with another agreement dated September 11, 1906, between the plaintiffs and certain other salt manufacturers in the north-west of England. They considered that when these agreements were construed together the contract of 1907 must be held illegal as being in restraint of trade, and as forming part of a scheme for securing a monopoly by restricting output and raising prices. 'In the present case,' said Farwell L.J., 'no circumstances in my opinion could justify such a contract made for the mere purpose of raising prices, with the inseparable incident of depriving the members of the public of the choice of manufacturers, while hoodwinking them into the belief that such choice is open to them; in any case, the special circumstances would have to be pleaded and proved by the plaintiffs.'

"In his dissenting judgment Kennedy L.J. held that there was no evidence on which, so far as the interests of the community were concerned, it could be held to be proved that the contract was contrary to public policy. It was, in his opinion, principally and essentially a contract for sale which was made between manufacturers and sellers of salt dealing with each other on equal terms, and regulating by partial and temporary restrictions, and for good consideration, the manufacture and sale of salt by one of them beyond a specified quantity, but only as part of a scheme for mutual profit. He found no sufficient evidence that the provisions of the contract of 1907 sued on were so injurious that it ought to be held invalid as offending against public policy."

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1913. Dec. 16, 17, 18. *Sankey, K.C.*, and *J. D. Crawford*, for the appellants. The contract sued on not being illegal on the face of it, the Court will not entertain the question of its illegality unless it is pleaded. It cannot be contended that this contract is void as going beyond the reasonable protection of the plaintiffs. Therefore the only point is whether it is void as against public policy. The contract may be viewed (*a*) from its private and (*b*) from its public aspect, and if it is not void as regards the parties the onus is on the defendants to prove that the public interest is damaged: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2); *Mason* v. *Provident Clothing and Supply Co.* (3) In all these cases the paramount consideration is freedom of contract: *Printing and Numerical Registering Co.* v. *Sampson.* (4) The mere fact that the result of a trade combination is to advance prices is not necessarily opposed to public policy. A combination to advance prices so as to give a proper remuneration to labour and capital is prima facie lawful: *Mogul Steamship Co.* v. *McGregor, Gow & Co* (5); *Jones* v. *North* (6); *Elliman, Sons & Co.* v. *Charrington & Son* (7); *F. Cade & Sons* v. *John Daly & Co.* (8); *Collins* v. *Locke.* (9) Although cheapness may be a desideratum a ruinous competition between traders is not to the public advantage: *Hare* v. *London and North Western Ry. Co.* (10) Nor is a combination illegal because for a limited period it restricts the output. There is nothing wrong in making a forward contract for a year or two years. Judicial views upon public policy have undergone great changes during the last century—see *Rex* v. *Waddington* (11)—and it is now recognized by the Courts that forestalling, which was formerly prohibited by statute, may be favourable to the development of trade rather than in restraint of trade: *Standard Oil Co.* v. *United States* (12); *United States* v. *American*

(1) [1913] A. C. 781, at p. 809.
(2) [1894] A. C. 535, at p. 565.
(3) [1913] A. C. 724, at p. 733.
(4) (1875) L. R. 19 Eq. 462, at p. 465, per Jessel M.R.
(5) (1889) 23 Q. B. D. 598.
(6) (1875) L. R. 19 Eq. 426.
(7) [1901] 2 Ch. 275.
(8) [1910] 1 I. R. 306.
(9) (1879) 4 App. Cas. 674.
(10) (1861) 2 J. & H. 80, at p. 103.
(11) (1800) 1 East, 143.
(12) (1911) 221 U. S. 1, at p. 55.

Tobacco Co. (1) In a question of public policy both the producer and the consumer are considered. The effect of a combination of this kind, so far from being injurious to the public, is beneficial to it, inasmuch as it standardizes the supply, ensures steadiness of the market and certainty of delivery, and minimizes waste.

Maurice Hill, K.C., and *Henry A. McCardie*, for the respondents. Upon these pleadings it was open to the defendants to raise the question of illegality at the trial. The plaintiffs by their reply relied upon the distributors' agreement and the inland conditions, and it was essential to their case to put in these documents. Where it is necessary to the success of the action that the plaintiff should prove the circumstances under which the agreement was executed it is immaterial whether the illegality depends upon the surrounding circumstances or appears on the face of the agreement itself. In either case it is the duty of the Court to determine the question, whether illegality is pleaded or not. The plaintiffs were asserting that they had the exclusive control of the market and their claim to damages was based upon that assertion. The relief claimed went beyond the pleadings and the result was to open up the whole question. The contract sued on, when read in conjunction with the other agreements and documents connected therewith, created a monopoly which resulted in unreasonably raising prices and was consequently illegal. The law starts with the view that restraints of trade are prima facie bad and it has always set its face against monopolies: *Hilton* v. *Eckersley*. (2) *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (3) is distinguishable because upon the evidence in that case no monopoly was created and prices were not enhanced.

Sankey, K.C., replied.

The House took time for consideration.

1914. Feb. 12. VISCOUNT HALDANE L.C. My Lords, this is an appeal by the plaintiffs in an action brought to recover damages for breach of a contract relating to the sale of salt. The question

(1) (1911) 221 U. S. 106. (2) (1855) 6 E. & B. 47.
(3) [1913] A. C. 781.

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to be determined is whether the contract was enforceable. [His Lordship stated the facts as above set out and continued :]

Some doubt has been raised as to whether the general agreement with the other salt manufacturers of September 11, 1906, was put in evidence. But I assume for the present that it was in evidence, and I turn to it. It is contended that it must be looked at because of the provision of the contract sued on, which says (clause 7) that the respondents, if they make any stoved vacuum salt, are to be elected distributors on the same terms and conditions as the appellants' present distributors. These terms and conditions are contained in a document dated August 7, 1908, which was submitted to the respondents as already stated, and which they refuse to sign. It is headed "Distributors' Appointment," and it purports to define the terms on which a person appointed to be one of the appellants' salt distributors may purchase salt from the appellants and sell it. It defines the quantity that may be so purchased at prices to be fixed by the appellants, and the conditions on which it may be resold at prices to be similarly fixed, and it contains provisions regulating the amount to be sold, the discounts, the use of craft and rolling stock, the freight and other charges, and the customers to whom sales may be made. It provides that the appellants are not to be bound to deliver salt except at the works where it is produced, and that they may, on receiving any order, decide at which of the works of any of their members it is to be delivered. The document contains a statement that similar appointments had been given to other distributors, who were named, and in some cases it was stated that the appointment contained a clause providing that it should not prejudice rights under an agreement of September 11, 1906, being the general agreement already referred to between the appellants and the other salt manufacturers.

This last-mentioned agreement, which purports to be made with fourteen salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford, comprising both companies and firms, contains provisions largely resembling those in the contract sued on. The purpose of both contracts was to enable the appellant company to control the sales and prices of salt within its

sphere of influence, and as the members of the appellant company were the salt manufacturers themselves, this was not impracticable.

My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality.

Now, in the case before us it is to me obvious that the Court of Appeal could not be sure that it had got before it the whole of the materials which were necessary if it was to be justified in deciding on the legality of what it took to be a scheme for securing a monopoly by restricting output and raising prices, and for depriving the public of the choice of manufacturers, while hoodwinking them into the belief that such choice was open to them.

Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great

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competition from abroad or from other parts of these islands than the part which was the field of the agreement. On material questions of fact such as these the Court of Appeal had not the proper evidence before it, and the pleadings of the respondents had thrown on the appellants no duty to bring forward such evidence.

The general agreement of 1906, which was referred to in the document relating to the appointment of distributors, was not the agreement sued on. It constituted only a surrounding circumstance in the case, and it is impossible to predict how that case might have appeared had the appellants presented full evidence of all the circumstances. The Court of Appeal ought, in my opinion, in the absence of amended pleadings and full evidence, to have refused to enter into what was a mere speculation on an intricate and wide question of fact. If this be so, then the only question which can legitimately be considered is whether the contract sued upon is one which on the face of it ought not to be enforced. As I read the judgments of the majority of the Lords Justices, they seem to have thought that the contract, although possibly valid if taken by itself, was not so in view of inferences of fact to be drawn from the character of the outside agreements to which it referred. But if there is not sufficient evidence to enable a Court to review the situation in its entirety, then the Court is confined to what appears on the face of the contract sued upon, including any documents incorporated with it. As the outside agreements and documents to which I have referred were not so incorporated, I think that they could not be looked at in an action with the restricted issues which the pleadings before us raise.

I come back, therefore, to the contract on which the action is based. My Lords, the law as to contracts in restraint of trade is not doubtful. In order to be valid a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which shew the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the

question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the Court, and is not an issue of fact.

My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured.

I have already adverted to the fact that competition from abroad and from other parts of the United Kingdom was not affected. It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry. No doubt if there were a monopoly attempted to be

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set up which was calculated to enhance prices to an unreasonable extent, that would, if it so appeared on the face of the contract, be ground for refusing to enforce it. But an effective attempt to set up such a monopoly or so to enhance prices can but rarely appear on the face of an agreement between two traders. Whether such an attempt is really being made is almost always a question of fact. It certainly does not appear as being made on the face of the agreement in question. It may well be that prices such as 18*s.* or 23*s.*, which were to be charged for the appellants' salt, were fair prices. The fact that the manufacturer is only to receive 8*s.* cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may be well worth while for a firm like the respondents, which obviously had to face much competition, to take a low price in order to secure a steady market, and the appellants' prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get.

Nor am I impressed by the view of Farwell L.J. that the arrangements stipulated for by the appellants for directing the supply of orders to be made from the factories which they thought most convenient in particular cases was detrimental to the public who might be hoodwinked thereby. Such distribution arrangements are common in business. One of their obvious purposes is to save cost of carriage, and there is no reason to suppose that the business world is either ignorant that they may exist, and so is likely to be deceived, or is incapable of taking care of itself. In an appeal which recently came before the Judicial Committee of the Privy Council (*Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1)) my noble and learned friend Lord Parker delivered on behalf of the Committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or

(1) [1913] A. C. 781.

group, he says (1) that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."

My Lords, I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a Court of justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public. And I agree with what was said by Lindley L.J., one of the most cautious and accurate judges of our time, in *Maxim-Nordenfelt Co.* v. *Nordenfelt* (2): "The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."

The result of the consideration I have given to this appeal is that I think that this House should declare that the contract in question has not been shewn to be in unreasonable restraint of trade, and that it was, therefore, enforceable by the appellants. As the Court of Appeal did not proceed to dispose of the points raised by the respondents as to the measure of damages, the case must be remitted to it for that purpose with the declaration I have suggested. The appellants are entitled to their costs of the appeal to this House and also to their costs of the last hearing in the Court of Appeal. I move accordingly.

LORD MOULTON. (3) My Lords, I agree, and in my opinion the sole question which your Lordships are called upon to decide is one of no difficulty if the history of this case is borne in mind.

(1) [1913] A. C. at p. 796.
(2) [1893] 1 Ch. 630, at p. 646.
(3) Read by Lord Parker of Waddington.

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The action is one of breach of contract. The plaintiffs sold goods to the defendants upon terms as to price and conditions of resale, &c., which are embodied in a written contract. The defendants broke their contract, and the plaintiffs are suing for damages for such breach. In their points of defence the defendants admit liability as to some of the alleged breaches and raise various defences to the others, none of which are now material, because it is no longer denied that the breaches were in fact committed, although there has been no final decision as to the measure or amount of the damages.

At the trial before Scrutton J. the plaintiffs put their manager into the witness-box to give evidence on some issue of fact raised in the pleadings. In commencing his cross-examination of this witness counsel for the defendants put a question to him admittedly not relevant to any matter pleaded, but directed solely to shew that the contract was, in fact, a contract in restraint of trade, and thus void or unenforceable. Objection was taken to the question on the ground that if the defendants intended to raise such a defence they ought to have pleaded it. The objection was sustained by the judge. He could scarcely have done otherwise in face of the specific provision in the Rules that the defendant must raise by his pleading all matters which shew the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, as, for instance, fraud, facts shewing illegality either by common or statute law. The defendants thereupon asked leave to amend their pleading so as to raise the defence of illegality, but the judge refused such leave, on the ground that it would be unfair to the plaintiffs to allow such an amendment to be made when the trial had already commenced.

The reasonableness of this refusal is not now in question. No appeal was brought against it, and the defendants have at no stage of the case renewed their application. It is evident, and, indeed, it is not denied, that the point was before the minds of their counsel from the first, and that it was not by inadvertence, but by choice, that it was not pleaded originally, or that leave to

add such a plea was not applied for during the period of more than eighteen months that elapsed between the delivery of the points of defence and the trial.

In the result the judge found in favour of the plaintiffs for 1055*l.* 4*s.* 10*d.* damages. The defendants appealed, and on the hearing of the appeal their counsel raised the contention that the contract sued on, when considered with the facts of the case as shewn by the evidence, was in restraint of trade, and was a contract having for its purpose and effect the maintenance of an illegal monopoly injurious to the public; that the Court was entitled, and, indeed, bound, to take cognizance of this contention; and that accordingly it ought to allow the appeal and dismiss the action, regardless of the fact that the issue of illegality was not raised in the pleadings. The Court of Appeal by a majority accepted this view of the case, and allowed the appeal on that ground. Questions as to the proper measure and amount of damages, therefore, became irrelevant, and the Court of Appeal has neither considered nor pronounced upon these matters.

The present appeal is from this decision of the Court of Appeal, and the discussion before this House has related solely to the question whether the Court was justified in dismissing the action on the ground that the contract was illegal and unenforceable. The argument on behalf of the defendants is a very specious one. It is conceded that if a written contract is ex facie in restraint of trade so as to be against public policy, the judge is entitled, and, indeed, bound, to take the point, and the decision is for him, and not for the jury. The same must be true when the question is whether a contract, when taken in connection with the surrounding circumstances, is in like manner against public policy. This must be so because the question is one of law, and therefore is for the Court and not for the jury; although it is needless to say that if there be a dispute as to the facts, that dispute has to be settled by the tribunal which has the duty of deciding as to fact before the judge can exercise his function. If, therefore, say the defendants, the Court, taking the contract in connection with the facts appearing in the plaintiff's case or otherwise legitimately

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brought before the Court at the trial, comes to the conclusion that it is against public policy, it is entitled and bound to dismiss the action.

This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, de non apparentibus et de non existentibus eadem est ratio, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the Court at the end of the case are therefore only a casual selection from the surrounding circumstances, and the Court has no longer the right to treat them as properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

Lurking beneath the argument for the defendants was the idea that the public good is a matter of such supreme importance that Courts should not require proof in due form and in accordance with the recognized requirements of our legal procedure of any charge of illegality or offence against the rules of public policy. But our judicial procedure is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold that this wholesome rule should be

relaxed when he is charged with something so grave as acting against the common weal. Such a proposition partakes of the absurdity of the rule in criminal proceedings that prevailed in England centuries ago, namely, that, because felony was so very wicked, persons accused of it should not be allowed the assistance of counsel. Happily we have shaken ourselves free from all such notions, and the principle that in all cases fair notice should be given to the plaintiff of all the defences that are to be raised is now so fully recognized in our procedure that it is formulated in the rule above quoted, in language which permits no misunderstanding as to the general rule, and which, in particular, specifically includes such a case as the present.

One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the Court would act upon it. But this is no exception to the general rule. Amendments of the pleadings and permission to the plaintiff to call evidence would ex hypothesi be useless in such a case, because the fact is conclusive of the illegality. But no such case is before us here. It is evident that had the issue been raised on the pleadings, it would have entitled the plaintiffs to call further evidence of various kinds, and such evidence might have negatived any inference that the parties were concerned in creating or supporting a hurtful combination in restraint of trade.

It remains to apply these principles to the present case. The contract sued upon is not ex facie illegal. So far as is material to this question, it may be described as a contract whereby the defendants have the option to buy up to a certain amount of stoved salt at a certain price, but there is a condition attached to this option that if they exercise it they shall not resell the goods except at certain prices and in a certain way. It was a hopeless task to argue that such a contract is ex facie against public policy, and accordingly the argument in the Court of Appeal and in this House turned mainly on the nature and status of a separate and independent contract made by the

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plaintiffs with other persons which was not incorporated in, and did not form part of, their contract with the defendants. It was contended that this latter contract was in restraint of trade and hurtful to the public, and that the contract with the defendants was in aid of this contract, and that therefore it also was invalid. There can be no doubt that if this issue had been raised on the pleadings the plaintiffs might have called relevant evidence as to the circumstances under which these contracts were made and as to their object and effect. This they had no opportunity of doing by reason of the defendants electing not to raise the issue by their pleadings, and we cannot pronounce on the question whether the surrounding circumstances were such as to render the contract with the defendants illegal because we have not the requisite material before us.

The consequence is that this appeal should be allowed with costs. The case must be remitted to the Court of Appeal on the question of damages.

LORD PARKER OF WADDINGTON. My Lords, I agree. A contract in restraint of trade may on the face of it be so unreasonable as between the parties, or so detrimental to the public, that the Court will on its own initiative refuse to enforce it. There may, however, be contracts in restraint of trade the validity or invalidity of which cannot be gauged by the terms of the documents themselves without reference to the circumstances under which they were executed. In such cases it is more difficult for the Court to act on its own initiative. Indeed, it ought not so to act unless it be quite certain that all the relevant facts are in evidence.

The present action was for damages for breaches of a contract in restraint of trade. As I read the pleadings, both the breaches and liability for the breaches are admitted, the substantial matter in dispute being as to the measure of the damages. No question was raised as to the validity of the contract itself, nor can it be contended that the contract is on the face of it either unreasonable as between the parties or detrimental to the public.

At the trial the defendants' counsel proposed to cross-examine

one of the plaintiffs' witnesses as to the circumstances under which the contract was executed, in order to shew that, having regard to those circumstances, the contract was invalid. The judge refused to allow this to be done, as no question of invalidity was raised by the pleadings. He also refused to allow the pleadings to be amended so as to raise the question of invalidity. Under those circumstances neither party had any opportunity of tendering the evidence which would have been relevant on this question if raised by the pleadings. It so happened, however, that certain facts and documents, which would have been relevant on this question if raised, were also relevant, and were admitted in evidence, on other issues in the action.

On the strength of those facts and documents the majority of the Court of Appeal (Kennedy L.J. dissenting) have held the contract sued on to be invalid as part of a scheme for securing a monopoly by restricting output and by raising prices. The question your Lordships have to determine is whether this decision can stand. For my part, I entirely agree with the dissenting judgment of Kennedy L.J. Even assuming that the facts and documents in question, if unexplained, would establish the existence of an attempt on the part of the plaintiffs to establish such a monopoly, your Lordships cannot disregard the fact that the plaintiffs have had no opportunity of explaining them. The full facts, if known, might profoundly modify any inferences your Lordships might be induced to draw from the imperfect information now before the House.

For example, the circumstances under which the plaintiffs entered into the agreement of September 11, 1906, with the salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford may have been analogous to those which the Privy Council recently considered in the case of *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1) in order to determine whether the trade restrictions contained in the "vend" agreement therein referred to were necessarily detrimental to public interest. The competition

(1) [1913] A. C. 781.

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between salt producers within the area covered by the agreement of September 11, 1906, either inter se or with salt producers outside this area may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition. Under these circumstances, though it was no doubt open to the Court of Appeal, taking the view they did of evidence, to direct a new trial, it was not, in my opinion, open to them to hold the contract invalid on the imperfect information before them. It appears that the defendants refused to concur in asking the Court of Appeal for a new trial, nor have they asked for this on the present appeal. Under these circumstances, I think the only course is to allow the appeal, and remit the case to the Court of Appeal to be dealt with on the footing that the contract was valid.

LORD SUMNER. (1) My Lords, I agree that it is unnecessary to decide any question about the form of the pleadings, the propriety of refusing to allow the defendants to amend, or the admissibility of any part of the evidence. In a case such as this the burden is on the respondents of proving the illegality on which they rely. Since the decision of *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2), this must be taken as established. The whole question is whether or not, in the condition in which the materials reach your Lordships, illegality has been proved.

As it appears to me, the agreement of 1906 and the evidence elicited in the cross-examination of Mr. Clarke are not materials sufficient to enable a Court to act in this matter. The defendants were not parties to that agreement, and the contract between the plaintiffs and the defendants did not become less than legal because the plaintiffs on their side had entered into particular engagements with strangers. It is not their motive but the

(1) Read by Lord Dunedin. (2) [1913] A. C. 781.

contract sued on that is in question. Much of the oral evidence was strictly immaterial since, though obtained in cross-examination, it went to no issue. It may, therefore, be disregarded. Nor does the residue suffice, for this simple reason. Whatever else can be made of it, if anything, this is certain, that we do not know half of the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none.

By this contract A. buys all B.'s product for a given and not protracted period, and buys it to sell again. B. has the right to buy back, or virtually to keep out, a certain quantity, if he desires to make a dealer's as well as a manufacturer's profit. To prevent B. from underselling A. he is put under terms as to his sales over. In law B. is probably a buyer from A. and a seller to third parties; practically his position hardly differs from that of A.'s del credere agent. To restrict an agent's authority can hardly be illegality in the principal, and there is little more here. Further, B. is restrained from opening up any more salt-bearing ground, directly or indirectly. In the case of a mineral which is not inexhaustible and cannot be renewed, that may as well make for the public good as not. No doubt the difference between the selling price fixed for the producers, the respondents, and the buying price open to the public is extreme, but we do not know enough of the conditions of competition or of the other elements in the ultimate selling price beyond bare cost of production to act upon it. Doubtless the parties entered into the contract in order to make money out of it, probably by keeping up prices, but that is not conclusive. I daresay the plaintiffs were not any more anxious to go into all the facts than the defendants were to plead illegality in black and white, but your Lordships have to decide this appeal as things stand here.

I am, therefore, of opinion that this appeal should be allowed with costs, and that the judgment of the Court of Appeal should be set aside and the case remitted to them to hear

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nd determine the other questions arising on the defendants' notice of appeal.

Order of the Court of Appeal reversed: Declare that the contract of November 9, 1907, *has not been shewn to be in unreasonable restraint of trade and that it was therefore enforceable by the appellants: The respondents to pay the costs on the last hearing of the cause in the Court of Appeal and the costs of the appeal to this House: The cause to be remitted back to the Court of Appeal, with the above declaration, to dispose of the points raised by the respondents other than the matters dealt with by the declaration in this order contained, and to do therein as shall be just and consistent with this judgment.*

Lords' Journals, February 12, 1914.

Solicitors for appellants: *Crump, Sprott & Co., for Archer, Parkin & Archer, Stockton-on-Tees.*

Solicitors for respondents: *Field, Roscoe & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

[HOUSE OF LORDS.]

SUGDEN (SURVEYOR OF TAXES) . . . . . APPELLANT; H. L. (E.)*

AND 1913

CORPORATION OF LEEDS AND ANOTHER . . RESPONDENTS. *April* 3.

Revenue—Income Tax—Loans charged on Undertakings of Corporation—Retention of Income Tax on Interest paid out of Profits brought into Charge—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 102—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 139, 143—*Leeds Corporation (General Powers) Act*, 1901 (1 *Edw.* 7, *c. cclv.*), *ss.* 37, 38, 39, 40, 46, 47.

The Leeds Corporation, under a series of Acts of Parliament, owned various undertakings and borrowed large sums of money for the purposes of these undertakings. Interest on loans raised for the purposes of an undertaking owned by the corporation as a municipal corporation was paid out of the revenue of the particular undertaking and the borough fund, which was dependent on the borough rate; and interest on loans raised for the purposes of an undertaking owned by the corporation as an urban sanitary authority was payable out of the revenue of the particular undertaking and the consolidated fund, which was dependent on a separate rate. The Leeds Corporation (General Powers) Act, 1901, s. 37, provided that all loans raised by the corporation for the purposes of its undertakings and properties should be charged indifferently upon such undertakings and properties, and that all such loans, whether raised before or after the passing of the Act, together with the interest thereon, should rank pari passu; and that the provisions of the earlier Acts authorizing the raising of money by the corporation and the granting of securities therefor should be read as though the charge authorized by this section had been the charge authorized by those provisions.

For the year ending April 5, 1903, the corporation was duly assessed to income tax upon the rents and profits, amounting to 270,000*l.*, of its various hereditaments and undertakings. The interest payable on the loans relating to these undertakings amounted to 285,000*l.* (being 15,000*l.* in excess of the rents and profits) and income tax was deducted by the corporation from its payments of interest. The profits of the borough fund undertakings and the borough fund exceeded the amount of interest on the loans relating thereto by 78,000*l.*, but the profits of the consolidated fund undertakings and the consolidated fund were less than the interest on the loans relating thereto by 93,000*l.* In accounting

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD KINNEAR, LORD ATKINSON, and LORD MERSEY.

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to the Crown the corporation claimed that by virtue of the Act of 1901 the entirety of the profits from its various undertakings and hereditaments was chargeable generally with the payment of interest on the whole of its loans, and that it was therefore entitled to retain the whole amount deducted for income tax except in respect of the 15,000*l.*, the excess of interest over profits:—

Held, that the Act of 1901 did not authorize the corporation to apply the surplus on the borough fund undertakings in paying interest on the consolidated fund undertakings, and that the corporation was therefore assessable to income tax in respect of the further sum of 78,000*l.* in addition to the 15,000*l.*, i.e., in respect of the 93,000*l.*

Decision of the Court of Appeal reversed.

Per Viscount Haldane L.C.: Under the Income Tax Acts, where the tax is payable on income arising from the profits of property or undertakings and out of these profits annual payments have been in substance and properly made, the person entitled to such profits, whatever in point of form may have been the way in which he has kept his accounts, is still charged with tax on the whole of his profits, but he is bound to deduct the tax due from the recipient in respect of the annual payments, and, as he has himself already paid tax on the whole profits, he is entitled to retain for himself the amount so deducted. If, on the other hand, the annual payments were not really and properly made out of profits, he is treated as having received these profits undiminished, and, though still bound to deduct the tax from what he has to pay the creditor, he must account to the Crown for what has been so deducted. It is not enough to entitle him to retain the amount of tax deducted from the annual payments that he has a merely contingent or ineffective right to pay out of the profits.

London County Council v. *Attorney-General* [1901] A. C. 26, *Attorney-General* v. *London County Council* [1907] A. C. 131, and *Edinburgh Life Assurance Co.* v. *Lord Advocate* [1910] A. C. 143 discussed.

APPEAL from an order of the Court of Appeal reversing an order of Hamilton J. upon a special case stated by the General Commissioners of the Income Tax for the Division of Leeds Borough under 43 & 44 Vict. c. 19, s. 59.

The special case was stated in the matter of an appeal by the respondents, the Corporation of Leeds and William Derry, against an assessment of the sum of 93,929*l.* part of an assessment of 97,185*l.* made upon Derry for the year ended April 5, 1903, under s. 102 of the Income Tax Act, 1842, as the proper officer having the management of the accounts in respect of interest paid by the corporation.

The corporation was created by a charter granted by King Charles II. dated November 2, 1661, and was also a municipal

corporation within the meaning of the Municipal Corporations Act, 1882, and an urban sanitary authority within the meaning of the Public Health Acts.

As a municipal corporation the corporation had provided in accordance with s. 139 of the Municipal Corporations Act, 1882, a borough fund (which, since Leeds became a city, was called the city fund), and in aid of the borough fund the corporation under the powers of s. 144 of that Act levied annually a borough rate. Under s. 143, sub-s. 1, of that Act, if the borough fund was more than sufficient for the purposes to which it was applicable under the Act, or otherwise by law, the surplus was to be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough.

The expenses of the corporation as an urban sanitary authority under the Public Health Acts and under certain local Acts were payable out of a fund consisting of the produce of a separate rate called the consolidated rate and receipts from various other sources, including rents from property, receipts from the electric lighting undertaking, and from the sanitary and fire brigade services, &c. The consolidated rate was levied annually under the authority of the Leeds Improvement Act, 1893, s. 37. By s. 38 of that Act it was provided that, as regards the consolidated rate and as regards any addition to the borough rate for gas or water purposes, the owners and occupiers of certain properties therein specified were to be assessed in respect of those properties in the proportion of one quarter only of the net annual value thereof.

The corporation owned various undertakings and properties, and in particular as follows:—(*a*) The waterworks undertaking; (*b*) the gasworks undertaking; (*c*) the tramways undertaking; (*d*) the markets undertaking; (*e*) the electric light undertaking; (*f*) certain lands and hereditaments within and beyond the city.

The first four of these undertakings were acquired and worked under a series of private Acts and provisional orders, and the electric lighting undertaking was acquired and worked under the Electric Lighting Act, 1882. Under the powers of these Acts and Orders the corporation borrowed very large sums of money for the purposes of its several undertakings. Loans raised for

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the purposes of an undertaking owned and worked by the corporation in its capacity of a municipal corporation were charged upon and the interest thereon was made payable out of the proceeds of the particular undertaking and the borough fund. Loans raised for the purposes of an undertaking owned and worked by the corporation in its capacity of an urban sanitary authority were charged upon and the interest thereon was made payable out of the proceeds of the particular undertaking and the consolidated fund. In no instance was a loan in respect of a borough fund undertaking charged upon the consolidated fund or a loan in respect of a consolidated fund undertaking charged upon the borough fund. The waterworks, the gasworks, and the tramways were borough fund undertakings; the electric lighting was a consolidated fund undertaking.

Sect. 33 of the Leeds Corporation (General Powers) Act, 1901, conferred on the corporation certain additional borrowing powers for tramways, gasworks, and other purposes therein enumerated, and enacted that in order to provide for the repayment of moneys borrowed thereunder and the payment of interest thereon the revenue arising from the particular undertaking in respect of which the loan was made should be primarily liable.

Sect. 37 provided as follows :—

Sub-s. 1. "All principal moneys shall be charged indifferently upon the lands and estates the water the gas and other the undertakings of the corporation and upon all the revenues of the corporation and each and all such principal moneys or any of them whether raised or owing before or after the passing of this Act together with the dividends interest annuities and all other annual sums for the time being payable thereon (such dividends interest annuities and other annual sums being hereinafter referred to as 'dividends') shall rank equally and pari passu without any priority or preference by reason of any precedence in the date of any statutory borrowing power or in the date of the raising of the money or in the date of the money becoming owing or in the date of the security issued or given in respect thereof or on any other ground whatsoever."

Sub-s. 2. "The provisions of the corporation Acts and Orders authorizing the raising of the principal moneys and the securities

granted issued and subsisting in respect thereof shall be read and construed as though the charge by this section authorized had been the charge in the said provisions and securities respectively authorized and given."

Sect. 38 provided for the establishment of a fund called the dividends fund and for the payment into that fund in each year of the sums ascertained to be required to pay the dividends on the various loans according to the respective amounts of dividends properly payable out of the several revenues of the corporation, and s. 39 required the corporation from time to time to apply the dividends fund in paying the dividends on the principal moneys.

Sect. 40 provided as follows: "As parts of the general account of the dividends fund the corporation shall keep separate accounts distinguishing and showing in relation to each undertaking or purpose for or in respect of which any of the principal moneys are borrowed by them all moneys paid into the dividends fund from the revenues of the corporation in respect of dividends on the several amounts of the principal moneys chargeable to that undertaking or purpose."

Sect. 47, sub-s. 1, provided as follows: "The yearly sum or sums to be provided under the provisions of this part of this Act shall be provided by contributions from the several revenues of the corporation (if any) specifically charged with or made liable to provide the same by or under any statutory borrowing power or by any resolution of the corporation having reference to the respective borrowing powers and if as regards any statutory borrowing power there is no such specific liability then from the several revenues out of which the respective contributions would be properly payable having regard to the purpose for which the borrowing powers are given and in default thereof or subject thereto out of the city fund and city rate or out of the consolidated rate or out of the highway rate as the corporation having regard to the provisions of this Act and the objects for which the statutory borrowing power was exercised may consider equitable."

In accordance with these provisions the interest on all the moneys borrowed by the corporation was duly paid out of the

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statutory dividends fund, and the corporation had kept separate accounts in relation to each undertaking or purpose for which any of the moneys were borrowed with the results stated below.

For the year ending April 5, 1903, the total amount required to pay the interest on all the loans contracted by the corporation was 285,446*l.*, and the corporation in paying this amount properly deducted the income tax thereon. The total amount of income from the several undertakings and properties above mentioned was 270,036*l.*, and in respect of this sum the corporation had been duly assessed to income tax and the amount of the tax thereon, 16,877*l.* 5*s.*, was duly paid.

It appeared from the accounts of the corporation that the profits of the borough fund undertakings and the borough fund exceeded the interest of the loans charged thereon by 78,519*l.* and that the profits of the consolidated fund undertakings and the consolidated fund were less than the interest of the loans charged thereon by 93,929*l.* In respect of the sum of 15,410*l.* (being the difference between the before mentioned sums of 285,446*l.* and 270,036*l.*) the corporation admitted that the Crown was entitled to assess it to income tax under Sched. D, but claimed that, except as to the said amount of 15,410*l.*, the whole of the 285,446*l.* must be taken to have been paid out of profits brought into charge for tax. The Crown, on the other hand, claimed that the corporation should be assessed to such income tax not only in respect of the 15,410*l.* but also in respect of the further sum of 78,519*l.*, making together the said sum of 93,929*l.*

The question at issue between the parties turned primarily upon the construction of s. 37 of the Leeds Corporation (General Powers) Act, 1901. The Crown contended that the surplus on the borough fund undertakings could not be lawfully applied in paying interest on loans incurred in respect of the consolidated fund undertakings and that the true effect of s. 37 was merely to unify the loans and the security for the purpose of giving to the lender the right to look, in case of ultimate repayment or of default, to the whole of the revenues charged. The corporation contended that its obligation was to pay into the dividends fund the required amount for interest without regard to the source

from which the money was derived, that therefore it was irrelevant to consider whether there was a surplus on any one undertaking and a deficiency on another, and that the corporation was entitled to say that to the extent of its aggregate net profits upon which it had paid income tax it must be considered to have paid interest out of income brought into charge within the meaning of the Income Tax Act, 1842.

The Commissioners decided in favour of the Crown and their decision was affirmed by Hamilton J.

The Court of Appeal by a majority (Cozens-Hardy M.R. and Farwell L.J., Kennedy L.J. dissenting) reversed the decision of Hamilton J.

1913. Feb. 6, 7, 14. *Sir John Simon, S.-G.*, and *W. Finlay* (*Sir Rufus Isaacs, A.-G.*, with them), for the appellant. The Act of 1901 has not created a common pool of all the undertakings of the corporation for all purposes and does not relieve the corporation from treating the several undertakings separately for purposes of income tax. Although the Act gives to every creditor a general charge on all the undertakings in the last resort there is no sweeping away of the primary charges on the separate undertakings under the earlier Acts. Sect. 37 does not purport to repeal the provisions of those earlier Acts and it was not the function of this section to affect the incidence of the income tax. Its only function was to give the creditor a better security. Further, the construction of the section adopted by the Court of Appeal is inconsistent with the other sections of the Act. The matter is important to the ratepayers because the proportions in which they contribute to the borough rate and to the consolidated rate are different. In the latter case certain classes of ratepayers are favoured. [They referred to *London County Council* v. *Attorney-General* (1); *Attorney-General* v. *London County Council* (2); *Edinburgh Life Assurance Co.* v. *Lord Advocate.* (3)]

Danckwerts, K.C., and *Ryde, K.C.* (with them *Jeeves*), for the respondents. The intention of the Act of 1901 was to consolidate the loans on the various undertakings and to charge them upon

(1) [1901] A. C. 26. (2) [1907] A. C. 131.
(3) [1910] A. C. 143.

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all the properties of the corporation indiscriminately. The Crown is not entitled to get income tax on the same thing twice over. The interest of the loans is payable out of the profits of any of the corporation undertakings, and the fact that as between the corporation and the ratepayers the corporation is bound to keep accounts of its several undertakings does not affect the rights of the Crown. Further, the money in question is chargeable not under Sched. D, to which s. 102 of the Act of 1842 relates, but under Sched. A, and if it is chargeable under Sched. A it is not chargeable under Sched. D and the proceedings are misconceived. [They referred to *Pedder* v. *Preston Corporation* (1); *Andrews* v. *Ryde Corporation* (2); *Mersey Docks and Harbour Board* v. *Lucas*. (3)]

Sir John Simon, S.-G., replied.

[Reference was also made to the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 40, s. 60, Sched. A, No. I., No. III., r. 3, No. IV., rr. 9 and 10, s. 100, Sched. D, 3rd case, s. 102; the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40; and the Customs and Inland Revenue Act, 1888 (48 & 49 Vict. c. 51), s. 24, sub-s. 3.]

The House took time for consideration.

April 3. VISCOUNT HALDANE L.C. (4) My Lords, broadly stated the principle of the Income Tax Acts is to charge all income with tax, but in the hands of the same person only once. Income is brought into such charge at its source, and the burden is then distributed among the recipients, who bear their shares of it proportionately. When the tax is payable on income which consists of the profits of property or undertakings, and out of these profits annual payments have in substance and properly been made, the person entitled to such profits, whatever in point of mere form may have been the way in which he has kept his accounts, is still charged with tax on the whole of the profits. But the Acts give him the right to deduct the tax due from the recipient in respect of the annual payments, and, as he has himself already paid tax on the whole profits, to retain for himself the

(1) (1862) 12 C. B. (N.S.) 535.
(2) (1874) L. R. 9 Ex. 302.
(3) (1883) 8 App. Cas. 891.
(4) Read by Lord Atkinson.

amount so deducted. If, on the other hand, the annual payments were not really and properly made out of the profits, he is treated as having received these profits undiminished, and, though still bound to deduct the tax from what he has to pay to the creditor, he must account to the Crown for what has been so deducted.

If the annual payments would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of tax he has deducted. On the other hand it is not enough to entitle him to retain it that he has a merely contingent or ineffective right to pay out of the profits. His right must be of a kind that actually enables payment to be properly made out of the profits, and does not leave them practically unaffected because of the existence of some other source of income primarily and effectively applicable in discharge of the burden. In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid.

My Lords, these propositions appear to me to result from the consideration of the Acts themselves, and their interpretation in the three cases on their construction, decided by this House in 1901, 1907, and 1910, to which reference was made during the arguments.

In the case now before the House the corporation of Leeds is the owner of various undertakings, such as waterworks, gasworks, tramway, markets, and electric lighting, and it owns certain hereditaments. The undertakings were acquired and worked under the provisions of various private Acts and provisional orders, excepting the electric lighting undertaking, which was owned and worked under the provisions of the Electric Lighting Act of 1882. Under the powers conferred by these Acts and Orders the corporation borrowed large sums of money. Where the money was borrowed for the purposes of an undertaking

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owned and worked by the corporation in its capacity of a municipal corporation, the loan was charged on, and the interest was made payable out of, the particular undertaking and the borough fund, which was dependent on the borough rate. Where the money was borrowed for the purposes of an undertaking owned and worked by the corporation in the capacity of an urban sanitary authority, the loan was charged on, and the interest was made payable out of, the particular undertaking and the consolidated fund, which was dependent on the consolidated rate. In the former case any surplus profits were earmarked for the borough fund and so for relief of the borough rate. In the latter case any such surplus went to the consolidated fund and in relief of the consolidated rate. In no instance, at all events prior to the year 1901, was a loan in respect of a borough fund undertaking charged on the consolidated fund, or a loan in respect of a consolidated fund undertaking charged on the borough fund.

The corporation was duly assessed to income tax for the year ending on April 5, 1903, on the rents and profits, amounting to about 270,000*l.*, of its various hereditaments and undertakings. In paying the interest on the loans relating to these undertakings the corporation properly deducted income tax. The amount of the interest so paid was some 285,000*l.*, being some 15,000*l.* in excess of its rents and profits. The corporation is, of course, bound to account for the tax deducted from this excess of 15,000*l.* which is not met by, and therefore had not been already taxed as part of, its receipts.

By the Crown it is conceded that the corporation is entitled to retain the tax deducted in paying interest to the extent to which such interest was effectively charged, under the Acts and Orders referred to, on the rents and profits of the undertakings of the corporation. The dispute in the case arises as to the tax on a sum of about 78,000*l.*, as to which the corporation affirms, and the Crown denies, that it was similarly charged on these rents and profits by virtue of the Leeds Corporation (General Powers) Act, 1901.

To understand the nature of the controversy it is necessary to refer briefly to the history of the relevant legislation.

The corporation of Leeds is a municipal corporation created by a charter of King Charles II., and is subject to the provisions of the Municipal Corporations Acts of 1835 and 1882. Leeds became a city in 1897. The corporation is also an urban sanitary authority, to which the provisions of the Public Health Acts apply. It has powers under the various Acts and provisional orders already referred to. As certain ratepayers were rated differentially according as the rate was a borough or a consolidated rate these ratepayers have had a material interest in any question as to which fund was to be resorted to for making up a deficit arising in connection with the undertakings of the city. Under the legislation prior to 1901, as I have already indicated, it was not permissible to charge the borough fund, and therefore the borough rate, with a loan deficit in respect of a consolidated fund undertaking or vice versa. Under the legislation referred to the money borrowed was, as I have said, charged on the profits of the undertakings for the purposes of which it was borrowed, and also, secondarily, on either the borough rate or consolidated rate, so that these rates were available in case of a deficiency in the profits.

The real question which arises is whether the Leeds Corporation Act of 1901 has so altered the principle by which the payment of the interest on loans was primarily to be made out of the profits of the respective undertakings on which they were raised that the corporation is no longer bound in such case to apply the profits specifically in discharge of the interest on the loan relating to the particular undertaking, and then to treat the balance as appropriated to the relief of the borough rate or the consolidated rate as the case may be, but has now to hold the entirety of these profits as income charged generally with the payment out of it of interest on the whole of the loans. A further question was suggested in the arguments as to whether the Act of 1901 had not wholly abrogated the securities of the various lenders and substituted for them general securities over the entirety of the undertakings and revenues of the corporation and on the rates, borough or consolidated, indifferently, such new securities ranking pari passu. Under the legislation prior to 1901 no such step as to vary a specific security or to substitute

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for it a different one, however good, appears to have been contemplated. The intention to take it under the Act of 1901 is not an intention which one would lightly presume in the absence of clear language. But I do not think it necessary to express an opinion as to whether the existing securities were kept alive as primary securities with a new and general but merely secondary charge added, or whether the language used is so clear that the inference of an intention to substitute a new security for an old one, in invitum as regards the lender, is too strong to be resisted.

The crucial question seems to me to be a narrower one and to arise in a different form. It is whether, even if the old securities are abrogated and a new security substituted so as to provide for the case of a deficiency, should liquidation in some form be necessary, the original statutory directions for the application of rents and profits are left standing and operative in the meantime, so that the corporation is bound to continue to apply its income from the various undertakings to the payment of interest on the loans specifically charged on them and, as regards any surplus, in relief of the particular rates and to the other purposes for which it was earmarked originally. I may add that it is obvious that, so far as the last point is concerned, those ratepayers who were rated differentially, according as the rate was borough or consolidated, had a material interest in the preservation of the old allocations and statutory directions, and therefore in the answer to this question.

My Lords, towards the end of his judgment, Hamilton J. discusses some observations of Lord Davey in the first of the two London County Council cases referred to in the argument before us (*London County Council* v. *Attorney-General* (1)). Speaking of the passage in which Lord Davey says that "it is enough if the interest is charged on or payable out of the taxable income, though there may be other subjects of charge," he interprets Lord Davey's words as meaning that the charge upon or right to pay out of the taxable income must be actually operative within what he calls "the measurable foresight of finance," and not merely contingently operative. As authority

(1) [1901] A. C. 26, at p. 46.

for this view he relies on what Lord Macnaghten said in the second of the London County Council cases (*Attorney-General* v. *London County Council* (1)). In the light of Lord Macnaghten's judgment, Hamilton J. interprets the expression, "payable out of," in Lord Davey's judgment, as used, not as signifying what is in antithesis to "charged upon," but as explaining its meaning, and, after saying that the case of the *Edinburgh Life Assurance Co.* (2) is not in opposition to this conclusion, inasmuch as there the company had a perfect right to treat interest as payable out of the income in question, he sums up the law as being that the person assessed can retain the income tax which he has deducted from the interest paid to his creditor only if the interest is operatively charged upon or payable, that is to say, immediately, out of the taxable income.

My Lords, I think this is the proper interpretation of the effect of the three decisions of this House which have been referred to, and I now turn to the private Act of 1901 to find what application the principle so established has to the case before us. Sect. 33 of this Act, after authorizing the corporation to borrow for various purposes, including tramways and gasworks, enacts that to provide for the repayment of principal and the payment of interest the several revenues of the corporation arising from the tramway and the gasworks undertakings are made primarily chargeable as was the case under the previous Acts. But s. 37 provides that all principal moneys shall be charged indifferently upon the lands and estates, the water, the gas, and other the undertakings of the corporation, and each and all such principal moneys or any of them, whether raised before or after the passing of the Act, together with the dividends, interest, annuities, and all other annual sums for the time being payable thereon, shall rank equally and pari passu without any priority or preference by reason of any precedence in the date of any statutory borrowing power, or in the date of the raising of the money, or in the date of the money becoming owing, or in the date of this security, or any other ground whatsoever. Sub-s. 2 provides that the provisions of the corporation Acts and Orders authorizing the raising of the principal moneys and the securities

(1) [1907] A. C. 131. (2) [1910] A. C. 143.

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granted, issued, and subsisting in respect thereof shall be read and construed as though the charge by this section authorized had been *the* charge in the said provisions and securities respectively authorized and given.

The latter sub-section apparently, for the purposes of the charge authorized by this 37th section, substitutes that charge for the existing charge, but the question remains what is the meaning of the substitution of the charge so authorized. Even taking the first part of s. 37 by itself I observe that the effect is twofold. Firstly, it is to constitute a general charge for the principal without any direction as to payment of interest; and secondly, it is to make the principal and interest under the securities rank pari passu without priority or precedence on any ground. The section does not purport to repeal the statutory directions which compel the corporation to pay the interest in the case of each undertaking specifically out of the profits of that undertaking. Nor does the Schedule of Repeals to the Act of 1901 repeal, as one would have expected had the intention been to alter the existing rights and duties in this respect, the provisions in the older Acts containing these directions. Sect. 37 is at least verbally consistent with these directions remaining operative under normal conditions and until the question of ranking had arisen, when the new charge was to be effective in place of the old charge. And if this be a possible construction it is, in my opinion, the proper one. For unless it is adopted a mode of using the rates of the corporation must, as I have already pointed out, be held to be sanctioned which will take away their rights from those ratepayers who, as I have said, are in possession of rights to differential treatment.

But the conclusion to which I have come does not rest merely on these considerations. In interpreting the provisions of a statute they have, as far as possible, to be interpreted so as to make them consistent, and unless the view which I have expressed is wrong, s. 37 would be inconsistent not only with s. 33, to which I have referred already, but with s. 47. That section directs that the yearly payments in question are to be provided by contributions from the several revenues of the corporation specifically charged with or made liable to provide the same by or under any

statutory borrowing power, or by any resolution of the corporation having reference to the respective borrowing powers, and, if there is no such specific liability, then from the several revenues out of which the respective contributions would be properly payable, having regard to the purpose for which the borrowing powers are given, and, in default thereof or subject thereto, out of the city fund and city rate or out of the consolidated rate or highway rate, as the corporation, having regard to the provisions of this Act and the objects for which the statutory borrowing power was exercised, may consider equitable. Sect. 46 directs the corporation to keep separate accounts relative to each undertaking. Sect. 49 provides for reborrowing, and that any principal moneys reborrowed are to be primarily chargeable on the same revenues and to be deemed to form the same loan as the money reborrowed. Sect. 48 provides for the case of any principal money or interest being unpaid, and for a receiver being appointed and having the same power of collecting and applying the money which ought to be paid under the corporation Acts and Orders as the corporation would have had.

My Lords, I am unable, after consideration of these sections, to arrive at the conclusion of the Master of the Rolls, that the interest on the loans is no longer presently payable out of the net receipts of the particular undertakings to which they belong, and that the net receipts cannot be earmarked for that purpose. What may happen if there is default and a question of ranking has arisen we are not called on to determine. In the meantime and pending that event I think that no other income than the profits of the several undertakings and properties is operatively and effectively charged with payment of the interest on the various loans. I agree with the conclusion reached by Hamilton J. and Kennedy L.J., who was in a minority in the Court of Appeal, and I think that the appeal ought to be allowed and the judgment of the former learned judge restored, and that the respondents should pay the costs here and below.

Lord Atkinson. My Lords, I concur. The statutory enactment upon which this case mainly turns is the 24th section of the Customs and Inland Revenue Act, 1888. Its construction

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has many times been the subject of judicial decision. Its third sub-section deals with the payment of interest or annuities charged with the payment of income tax. The sub-section is not, perhaps, happily worded, but its main object is, I think, clear.

It was designed to protect the subject from the injustice to which he would be subjected if the tax were exacted twice over, in effect, on the same sum of money, namely, first, on the acquisition or receipt of that sum by the debtor bound to pay the interest or annuities mentioned, and, second, on the payment by him of practically the same sum to his creditor or creditors in discharge of that interest or of those annuities.

The words "such tax," used in the sub-section, according to the judgment of Lord Macnaghten in the first London County Council case (1), simply mean the income tax. The profits "and gains brought into charge" may, for convenience, be styled the "taxed fund," and all other resources of the debtor may be styled the "untaxed fund." The first important question to determine, then, is, what is the meaning of the words "not payable out of" this taxed fund? They cannot mean, I think, not charged upon the "taxed fund." Every professional man who has nothing but his professional income, or tradesman who has nothing but the profits of his trade to live on would be entitled to retain for his own benefit the tax he had deducted from an annuity he had contracted to pay if he had, in fact, paid it out of that income, or those profits, forming the "taxed fund," though the annuity were not specifically charged on anything. This is, I think, according to the invariable practice. If, then, these words "not payable out of" do not mean "not charged upon," it appears to me they must mean "not legally payable out of," that is, which cannot lawfully be paid out of the "taxed fund."

If the interest or the annuities were in fact, but against the law, paid out of the "taxed fund," then, though the tax should be deducted from the creditor, it could not be retained by the debtor. He should account for it to the revenue. Of course, if the interest and annuities be charged upon the taxed fund they will almost necessarily be lawfully payable out of it. This fund

(1) [1901] A. C. 26.

might, however, not be charged as the primary security, or some condition might have to be fulfilled, before it could be so applied, in which case payment out of it might be illegal till the first fund was exhausted, or the condition fulfilled. If this be the true view as to the meaning of these words, "not payable out of," then the results of the application of the sub-section would, according to the authorities, apparently be the following:—

(1.) Where no portion of the interest or annuities charged with the tax could be lawfully paid out of the "taxed fund," the debtor, who on paying this interest or these annuities deducts the appropriate tax from his creditor or creditors, must account to the Commissioners of Inland Revenue for the full amount of the tax so deducted.

(2.) When only a portion of this interest or these annuities can lawfully be paid out of the "taxed fund," then the debtor, though bound to deduct the tax from his creditors on the full sums paid to them, is only bound to account to the Revenue Authorities for the amount of the tax deducted from that portion of the interest or annuities actually paid out of his untaxed fund. The remainder of the entire sum deducted he is entitled to retain for his own benefit.

(3.) When the interest and annuities so charged may with equal legality be paid out of either the "taxed" or "untaxed" fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the "taxed fund." It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where in the ordinary course of business it should be applied for that purpose.

In the London County Council case (1) already cited the "taxed" fund was, under regulations made under s. 15 of the

(1) [1901] A. C. 26.

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London County Council (Money) Act, 1889, and approved of by the Treasury, specifically appropriated to the payment of the interest on their consolidated stock. (1) But it was inadequate in amount, and, therefore, that interest when paid in full, as it was, must of necessity, to the extent of the deficit, have been paid out of the untaxed funds of the council—the rates. It was only in respect of the amount of the tax deducted on this latter sum that the county council were held bound to account to the revenue.

In *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2) the taxed fund was fully adequate to pay all the annuities, but was not specifically appropriated to that purpose. On the contrary the taxed and untaxed funds were blended, and a mixed fund created. It was decided that the annuities, though in fact paid out of this mixed fund, should be taken to have been paid out of the taxed portion of it. So that the subject should not be made liable to the tax by reason of the mere form in which his books were kept, but should be put in the same position as if the "taxed fund" had been set apart to pay the claims upon it, and they had, in fact, been paid out of it. In both these cases the taxed and untaxed funds were charged; in the first with the payment of the interest on the stock, and, in the second, with the payment of the annuities.

Sect. 24, sub-s. 3, is obviously conversant with the action of the debtor and his liability to the revenue. It has no special reference to the remedies the creditor from whom he deducts income tax may have to recover the interest or annuities due. That is outside its purview.

In the present case the respondents, in their capacity of a municipal authority, borrowed large sums to finance certain municipal works and undertakings, such as waterworks, gasworks, tramways, &c. These were very lucrative. They yielded an income far in excess of what was necessary to pay the interest on the money borrowed. That income was paid into the borough fund of the corporation.

The respondents, in their capacity of a sanitary authority, also borrowed large sums to finance certain sanitary works and

(1) [1900] 1 Q. B. 192, at p. 201. (2) [1910] A. C. 143.

undertakings, using the term " sanitary " in its widest sense, such as electric lighting, &c. These latter undertakings were not at all as lucrative as the municipal undertakings. The income from them was not nearly sufficient to meet the interest on the loans. The precise financial position of the corporation was this: the amount required in the year in question in this case to pay the interest on all the loans contracted was 285,446*l.* The income from the several undertakings to finance which these loans were incurred amounted to 270,036*l.* There was, therefore, a deficit of 15,410*l.* This sum must necessarily have been paid out of their untaxed funds, and the respondents admit that to the extent of the tax deducted on payment of this sum they are bound to account. The income from what I have called the sanitary undertakings was deficient by the sum of 78,519*l.* to meet the interest on the sanitary loans. Though the consolidated rates were, as well as the undertakings, charged with the payment of this interest, a rate was not struck to meet this deficit. It was admittedly not paid out of the consolidated rate.

It must, therefore, I think, be taken that it was, in fact, though possibly not in form, paid out of gains or profits brought into charge, i.e., the taxed funds of the corporation. I do not think it can be taken that it was paid solely out of the borough rate.

In this condition of things, the corporation, on their own initiative, and not as a result of hostile legal proceedings taken against them by creditors, met this deficit by an advance of 78,000*l.* out of their borough fund, which they applied to the payment of the interest on the loans contracted for sanitary purposes.

Now the borough fund is created under the provisions of the Municipal Corporations Act of 1882. By s. 139 of that statute it is enacted that the rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging to a municipal corporation, shall be paid into the borough fund. In addition to these, the city or borough rate and, under various local Acts, the receipts from waterworks, gasworks, tramways, and other undertakings of the corporation are also to be paid into the fund. By the 140th section this fund is made applicable to, and is charged with, the several payments specified in the Fifth Schedule to the

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Act, amongst which are (item 11) "All expenses charged on the borough fund by any Act of Parliament or otherwise by law."

In addition, in no instance up to the year 1901 has a loan effected in respect of a sanitary undertaking, as distinguished from a municipal undertaking, been charged upon, or the interest made payable out of, the borough fund. On the contrary, it has invariably been charged upon, and the interest made payable out of, a certain other fund called the consolidated fund. The converse is equally true. In no instance has a loan contracted for a municipal undertaking been charged upon the consolidated fund. The electric lighting undertaking was financed and instituted under the provisions of a public statute, the Electric Lighting Act of 1882. The 7th and 31st sections of that Act combined, in effect, provide that the expenses of the undertaking may be defrayed out of the local rate mentioned in the schedule to the Act, which, in the case of the city of Leeds, is the consolidated fund. Moreover, special provisions are introduced into the different Acts under which the waterworks, tramways, gasworks, &c., were constructed, to the effect that balances not required for the undertaking should be paid into the borough fund, and that all deficiencies should be met out of that fund.

Not only, therefore, are all loans other than those obtained for sanitary purposes charged upon the borough fund, but it is provided by s. 143, sub-s. 1, of the Municipal Corporations Act of 1882 that if that fund be more than sufficient for the purposes to which it is applicable under the Act or otherwise by law, the surplus shall be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough. It is not contended that sub-s. 2 of that section applies to this case. As matters stood, therefore, before the year 1901 this enactment made it illegal to devote any of this surplus to the payment of the interest on the loans contracted for sanitary purposes. That interest was charged upon an entirely different fund, a fund fed by a consolidated rate raised upon a system of rating entirely different from that upon which the borough rate is raised, namely, a differential system. The question then is—Has the local Act of 1901 impliedly repealed not only this provision of the Act of 1882, but also the provisions of the several

statutes under which the municipal undertakings were authorized charging each with the payment of the loan by which it was financed as well as the interest thereon? Have the corporation been empowered, on their own initiative and without hostile pressure, to change the nature of the securities held by their creditors without those creditors' consent, to pool, as it were, their entire loans and the securities held for the payment of them, and, without altering the differential system of rating upon which the consolidated rate is raised, to divert their surplus income from purposes which might lighten the borough rate to purposes which must lessen the consolidated rate? For the reasons stated at length with the utmost clearness by Hamilton J., I am of opinion that the local Act has not this effect, though it may possibly extend the reach of the remedies of the creditor who, in hostile proceedings against the respondents, seeks to recover his debt or the interest due upon it. I concur, therefore, in thinking that the corporation cannot retain for their own benefit the income tax they have deducted in respect of this sum of 78,519*l.*, and are assessable for it, not for the reason, however, that the tax must be taken not to have been paid wholly or partly out of a "taxed fund" belonging to them, namely, the income from the municipal undertakings, &c., but because it was not legally payable out of the particular fund out of which it has, in fact, been paid. The corporation had not, in my view, any power to devote the surplus of the income from their municipal undertakings to meet the deficit on their sanitary undertakings, and thereby to apply that surplus in relief of the consolidated rate.

I would wish, however, to point out that the true import of the passages cited from the judgments of Lord Davey in the first London County Council case (1), and of Lord Macnaghten in the second case (2), can only be properly apprehended if they be taken in connection with the contentions of the parties in the cases to which they respectively apply. In the first case Lord Davey, at p. 46 of the report, says, "The contention (of the Crown) is that as the interest on their consolidated stock is charged on the whole of the lands, rents and property belonging to the council and on their rates, such interest ought, for the

(1) [1901] A. C. 26. (2) [1907] A. C. 131.

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benefit of the Crown, to be apportioned rateably over all the subjects of charge and only a rateable proportion deemed to be paid out of their income from rents or from interest receivable by them from their own debtors." He then proceeds: "The proposition has the merit of novelty. Admittedly there is no authority for it. The attention of your Lordships was not called to any statutory enactment directing any such procedure, or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts in order to raise a right of reduction and detention that the interest or annual payment should be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if interest is charged upon or payable out of the taxable income, though there may be other subjects of charge."

Lord Davey was, obviously, dealing altogether with this question of apportioned rateability, and his judgment is no authority whatever for the proposition that interest must be what is called "effectively" charged on a taxed fund in order to entitle the debtor to retain what he deducts, or that if "ineffectively" charged upon any fund it is not "payable" out of that fund within the meaning of s. 24, sub-s. 3, of the Inland Revenue Act of 1888. What it is an authority for is, I think, this: (1.) that there is not to be any apportionment of rateability in favour of the Crown between two funds out of either of which the interest or annuities charged with the tax may lawfully be paid; and (2.) that in case a mixed fund be formed from two funds, out of either of which the interest and dividends charged with the tax may lawfully be paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, "that annual charges should, in the first place, be paid out of annual income."

The principle of apportioned rateability contended for by the Crown in this County Council case was adopted by the Court of Session in the *Edinburgh Case* (1), and their decision was reversed,

(1) [1910] A. C. 143.

in effect, on the very principle thus laid down by Lord Davey as to the due course of administration of payment, that is, that it had to be assumed that the annuities were, in fact, paid out of the portion of the mixed fund consisting of annual income upon which they were an annual charge.

In the second County Council case (1) the council had to pay under Sched. A. income tax on the annual value of property in their own occupation. It was assessed at 118,000*l.* per annum. This, like all the other property of the council, as well as the rates, was charged with the payment of the dividends on their consolidated stock. It had been decided in the first case that the council could not retain the tax deducted in respect of the dividends paid out of the rates, as the rates were not a "taxed fund." What the council in the second case contended for was that they were entitled to retain out of the amount deducted from the dividends paid out of the rates the income tax paid by them on this sum of 118,000*l.* the annual value of the property they occupied, that this sum should be treated as annual income which they had, in the due course of administration of payments, applied to satisfy the annual charges upon it.

That contention was held to be unsound, but it was in reference to it that Lord Macnaghten used the words upon which this distinction between "effective" and "ineffective" charges has apparently been founded. At p. 136 of the report he says: "But I cannot understand what the property in the occupation of the council has to do with the matter. It stands apart. It is quite true that this property is charged in favour of the holders of Metropolitan stock, but the charge is not and never can be operative. It is superseded by the charge on the rates. The 'profits and gains' derived from the property in the occupation of the council are charged at their source in the hands of the council under Sched. A. The stream flows no further. It is enjoyed and absorbed by the council. The council must have the use and occupation of some property to perform their statutory duties. So long as the rates are available to meet the demands of the stockholders the council are secure in the full and beneficial enjoyment of the property they occupy."

(1) [1907] A. C. 131.

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And then he proceeds to ask the question, "What possible claim can there be to relief or indemnity as regards income tax in respect to this property?" My answer to this is none, because dividends paid to the stockholders were not paid, could not be paid, and must not be taken to have been paid, out of a mere enjoyment, valued no doubt under Sched. A at 118,000*l.* per annum, but not available as money received by the council for the payment of any of their debts. It will be observed that in this passage Lord Macnaghten is not dealing with the remedies the creditors of the council might have to recover their debts, but with the voluntary and spontaneous action of the council in the administration of their own property. In my view, therefore, the right of the debtor who has paid "interest or annuities" brought into charge to the income tax to retain for his own benefit the amount of the tax he has deducted from his creditors depends upon whether he can answer in the affirmative each of the two following questions:—

(1.) Have the interest and the annuities been, in fact, paid, or must they, in the circumstances of the case, be taken to have been, in fact, paid out of "profits or gains brought into charge," i.e., out of the so-called "taxed fund"? (2) Was it lawful to pay them out of that fund? If either of these questions be answered in the negative, he must account to the revenue for the tax he has deducted. This is, I think, the only workable rule which can in practice be applied. It inflicts no injustice upon the subject. To allow him to retain the tax where he has not, in fact, paid it in the first instance himself would be, in effect, to allow him to levy a tax upon his creditors for his own benefit, not for that of the Crown. And if he has applied the moneys of a "taxed fund" to discharge debts liable to income tax, in a way the law forbade him to do, he is the author of his own wrong and deservedly suffers.

In the present case I think the corporation, though they might be able to answer the first of these two questions in the affirmative, must, on the true construction of the Act of 1901, answer the second in the negative. And for that reason I think the appeal should be allowed with costs, the judgment and decision appealed from reversed, and the judgment and decision

of Hamilton J. restored. And I express no opinion on what property might, under the Act of 1901, come within the reach of the remedies of the creditors of the corporation in hostile litigation.

I desire to say that I have been authorized by Lord Halsbury to say that he concurs in the conclusion arrived at.

LORD MERSEY. (1) My Lords, for the reasons to be found in the judgment of the Lord Chancellor and the judgment of my noble and learned friend Lord Atkinson, I think that this appeal ought to be allowed, and I desire to add only a few words.

The question is whether two sums of 15,410*l.* and 78,519*l.* respectively, making together 93,929*l.*, were payable out of profits and gains which had already been brought into charge to income tax. The appellant (the Crown) says they were not so payable, whereas the respondents (the corporation) say they were. The two sums represent the excess of interest on loans raised in relation to certain undertakings worked by the corporation either under the Electric Lighting Act, 1882, or in their capacity as an urban sanitary authority, over the profits earned by those undertakings. The ground upon which the corporation allege that the two sums have already been brought into charge is this. They say (truly) that in their capacity of a municipal corporation they work many undertakings which result in profits exceeding the interest on the loans raised in relation to them, and that these profits have been brought into tax, and they claim that they are entitled to pay the interest on the 78,519*l.* out of these profits. In other words, they contend that the accounts of the municipal, the electrical, and the sanitary undertakings ought to be lumped together for the purposes of income tax, and that when so lumped together it will be found that the 78,519*l.* has been brought into charge.

It may be conceded that if the accounts are amalgamated in this way the result will be to shew, as contended, that the 78,519*l.* has already been brought into tax, and there remains, therefore, one question only, namely, whether the corporation are entitled as against the Crown to deal with the accounts in this way. The answer, in my opinion, turns entirely on the true

(1) Read by Lord Shaw of Dunfermline.

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effect of the Leeds Corporation (General Powers) Act, 1901. Before this Act the profits arising from each undertaking were by statute allocated to specific purposes, and it was not lawful to divert them from those purposes. As the law then stood it was not possible to employ the profits of one undertaking towards the payment of the liabilities of another undertaking. But it is said that this has been altered by the Act of 1901. It is, therefore, necessary to examine the Act to see whether this is so.

One of the principal objects of the Act of 1901 was to enable the corporation to borrow money for the purpose of carrying out certain improvements in the city of Leeds authorized by the Act. The sections of the Act relating to this matter are headed "Financial Provisions," and they extend from s. 32 to s. 59 inclusive. The first, and, in my opinion, the only material section, is the 37th. By sub-s. 1 of this section it is enacted that "all principal moneys" shall be charged indifferently upon the undertakings and revenues of the corporation, and that all such principal moneys, together with the interest payable thereon, shall rank equally and pari passu without any priority or preference. By the interpretation section (s. 4) the expression "principal moneys" is defined as meaning "any moneys owing or to be owing or borrowed or to be borrowed by the corporation under any statutory borrowing power." Thus it appears that a "charge" in favour of all existing and future loans was created upon the whole of the corporation property. One of the objects of this clause was doubtless to secure in the amplest way the whole of the liabilities of the corporation, and thus to enable the corporation to raise their loans on the best possible terms. It appears to be a charging section and nothing more. It is not, however, very material to inquire what the section does enact; it is much more important to notice what it does not enact; and it is, in my opinion, clear that it does not enact that the method of dealing with the annual profits of the different undertakings should be altered. These annual profits were, as I have already said, by statute applicable to certain purposes only. This sub-section does not deflect such profits from those purposes.

The second sub-section of s. 37 enacts that the provisions of earlier Acts authorizing the raising of money by the corporation

and the granting of securities therefor are to be read as though the charge authorized by the first sub-section had been the charge authorized by those provisions. But this again is, in my opinion, but a charging provision, and does not affect the statutory method of allocating the profits of the different undertakings.

I do not stop to examine the sections which follow the 37th. For the reasons to be found in the judgment of Hamilton J. I think their language "preserves, instead of repeals, the provisions of the earlier Acts, by which it was assumed that certain dividends were properly payable out of the several revenues instead of being permissibly payable in general out of all the revenues in the aggregate."

The Act of 1901 does not in terms, nor does it, in my opinion, by necessary implication, repeal the relevant provisions in the earlier Acts, and in the absence of such a repeal, I think the corporation are precluded from applying the profits of the municipal undertakings to aid the other undertakings of the corporation. It follows that the two sums, amounting together to 93,929*l.*, have never been brought into tax, and that in collecting the tax from the payees the corporation are not recouping themselves for a payment which they have already made, but are acting merely as the tax collectors of the Crown, and to the Crown they must accordingly account.

I think the appeal should be allowed, and the judgment of Hamilton J. restored.

Lord Kinnear. My Lords, I concur in the judgment proposed for the reasons stated by the Lord Chancellor in the opinion which has been read by my noble and learned friend.

Order of the Court of Appeal reversed and order of Hamilton J. restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, April 3, 1913.

Solicitor for appellant: *H. Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondents: *Sharpe, Pritchard & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 *Feb.* 27.

WILLIAMS BROTHERS . . . . . APPELLANTS;

AND

ED. T. AGIUS, LIMITED . . . . . RESPONDENTS.

Contract—Sale of Goods—Breach—Non-delivery—Measure of Damages.

A. contracted to sell to W. a cargo of coals to be shipped in November, 1911, at the price of 16*s.* 3*d.* per ton c.i.f. Genoa or certain other specified ports in Italy and failed to deliver the cargo. The contract contained an arbitration clause in respect of all matters arising out of the contract. In October, 1911, W. agreed to sell to G. of Turin a cargo of coals of the same amount and description at 19*s.* per ton c.i.f. Genoa. In November G. sold to A. the cargo he had bought from W. at 20*s.* per ton, and ceded to A. all his rights and liabilities under his contract with W. At the date of A.'s breach of contract the market price of the coal was 23*s.* 6*d.* per ton. A dispute having arisen between W. and A. whether the measure of damages in respect of the non-delivery of the cargo was the difference between the contract price of 16*s.* 3*d.* per ton and the market price at the time of the breach, or the difference between the contract price and the price at which W. sold to G., the matter was referred to arbitration under the terms of the contract. The arbitrator found that W. intended to resell to G. the cargo due to him from A. and appropriated that cargo to his contract with G., and he gave his award in the form of a special case:—

Held, that the arbitrator had no jurisdiction to deal with matters outside the contract, and that the true measure of damages was the difference between the contract price and the market price at the time of the breach.

Rodocanachi v. *Milburn* (1886) 18 Q. B. D. 67 approved.

Decision of the Court of Appeal reversed.

Per Lord Dunedin: In a question of the measure of damages in respect of a breach of a contract for the sale of goods there is a distinction between non-delivery and delayed delivery.

Wertheim v. *Chicoutimi Pulp Co.* [1911] A. C. 301 distinguished.

APPEAL from an order of the Court of Appeal (Vaughan Williams L.J. and Bray J., Hamilton L.J. dissenting) reversing an order of Bailhache J. upon an award of an umpire stated in the form of a special case.

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD MOULTON, and LORD PARKER OF WADDINGTON.

The following statement of facts is taken from the judgment of Lord Dunedin.

"Messrs. Agius, the respondents in the appeal, merchants in London and Hull, entered, on June 25, 1910, into a contract with Messrs. Williams, the appellants, for the sale of six cargoes of 4000 to 5000 tons of a certain class of gas coal, namely, New Pelton or Holmside, at their option, at a price of 16*s.* 3*d.* per ton, c.i.f., to certain specified ports in the Mediterranean, cargoes to be shipped every alternate month, beginning with January in 1911. There was an arbitration clause as to all matters arising out of the contract.

"The November shipment was admittedly not delivered, whereupon the appellants claimed damages before the arbitrators and umpire.

"The special case sets forth that on the date of the breach of contract the market price of coal the same as contracted for was 23*s.* 6*d.* per ton. The respondents accordingly claimed the difference between 16*s.* 3*d.* and 23*s.* 6*d.* per ton.

"During the month of October, 1911, the appellants had in contemplation to resell the coal which they would receive under the November shipment, and through an agent, Conti, in Genoa, and a broker, Colonna, they entered into negotiations with a Mr. Ghiron, of Turin. The negotiations resulted in the handing by Colonna to Ghiron of a sale note in the Italian language, of date October 28, 1911, which states that there has been sold to Ghiron, by Messrs. Williams, a cargo of 4000 to 5000 tons of New Pelton or Holmside coal to be shipped in November at the price of 19*s.* per ton, c.i.f., Genoa. There is a right given to the seller to delay delivery in case of war, but otherwise the obligation is absolute. The original of this document is not produced, but there is a translation, which includes a sentence as follows: 'Messrs. Williams cede the usual original contract of Messrs. Agius, who are the sellers to Messrs. Williams.'

"The fact of a sale having been effected was communicated by telegrams passing between Conti and Messrs. Williams, and following thereon Messrs. Williams sent from Hull to Ghiron of same date, October 28, a formal sold note. This note set forth the subject of sale and the price in the same terms as the Colonna

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note, but contained the following clause: 'Sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them by Messrs. Agius of London.' This note was signed by Messrs. Williams. This was followed by a formal purchase note in identical terms, being signed by Ghiron, as of even date and forwarded to Williams.

"On or about November 28 Messrs. Agius approached Ghiron, and for a payment of 225*l.* acquired his rights under the three documents just mentioned.

"In these circumstances the respondents contended before the arbitrators that the damages must be limited to the difference between 16*s.* 3*d.* and 19*s.* per ton, and that they had tendered the sum of 618*l.* 15*s.* to Messrs. Williams Bros.

"The umpire, upon whom the matter, on failure of the arbitrators to agree, came to devolve, in the special case, after setting forth the facts above mentioned, found the following findings:—

"'(*a*) It was the intention of the above named Messrs. Williams Bros. throughout to resell to the said P. Ghiron the November cargo which the above named Messrs. E. T. Agius Ltd. were under contract to deliver as aforesaid and the above named Messrs. Williams Bros. appropriated the November cargo they were entitled to receive from the above mentioned Messrs. E. T. Agius Ltd. as aforesaid to their said contract with the said P. Ghiron.

"'(*b*) The said contract between the above named Messrs. Williams Bros. and the said P. Ghiron was made by the said Conti as agent to the above named Messrs. Williams Bros. through the mediation of the said Ferdinando Colonna in Italy on the 28th October 1911 and in the terms of the said sale note of that date from the said Colonna to the said P. Ghiron and the said sale note dated 28th October 1911 from the above named Messrs. Williams Bros. to the said P. Ghiron was not sent out by the above named Messrs. Williams Bros. until the 31st October 1911.

"'(*c*) The said P. Ghiron as far as he lawfully might cancelled the said contract of the 25th June 1910 so far as it related to the November cargo contracted to be delivered by the above named Messrs. E. T. Agius Ltd. to the above named Messrs. Williams Bros.

"'(*d*) On the date of the breach of their contract with the above named Messrs. Williams Bros. by the above named Messrs. E. T. Agius Ltd. the market price of the said coal was 23*s*. 6*d*. per ton.

"'(*e*) There was no tender by the above named Messrs. E. T. Agius Ltd. to the above mentioned Messrs. Williams Bros. of the said sum of 618*l*. 15*s*. or any sum.

"'(*f*) In my opinion it is in accordance with trade equity and fair dealing that the above named Messrs. E. T. Agius Ltd. should be entitled to purchase the said P. Ghiron's contract with the above mentioned Messrs. Williams Bros. and cancel the whole transaction paying the differences in prices as was purported to be done.'

"The special case came before Bailhache J., who found in favour of the appellants. In his view the contract with Ghiron was embodied in the formal documents of the sale and purchase note signed by the principals, which superseded any prior informal documents such as the sale note of Colonna. Under the formal note there was in terms of the claim of exemption no contract with Ghiron at all. Ghiron had nothing to convey to the respondents, and the respondents must therefore pay damages for non-delivery on the basis of market price at the time delivery ought to have been made.

"On appeal, the majority of the Court of Appeal, Hamilton L.J. dissenting, held that the umpire had decided as fact that the contract with Ghiron was contained in the note of Colonna; that it was, therefore, a binding contract, and that the respondents, as assignees of Ghiron, could plead his contract, and thereby reduce the damage to the difference between 16*s*. 3*d*. and 19*s*."

1914. Feb. 16. *Adair Roche*, *K.C.*, and *Cuthbertson*, for the appellants. 1. The true measure of the damages recoverable by the appellants for the non-delivery of the coal by the respondents is the difference between the contract price and the market price at the date of the breach, and any further dealings by the appellants with the coal are irrelevant to the question of the measure of damages: *Rodocanachi* v. *Milburn* (1); *Williams* v. *Reynolds* (2);

(1) 18 Q. B. D. 67. (2) (1865) 6 B. & S. 495.

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Wertheim v. *Chicoutimi Pulp Co.* (1) The principle of *Rodocanachi* v. *Milburn* (2) has been adopted by the Legislature in the Sale of Goods Act, 1893, s. 51, sub-s. 3. It will be said by the respondents that sub-s. 2 of s. 51 is an exception to sub-s. 3, but the true reading of the section is that sub-s. 3 is a definition of what is meant by the loss referred to in sub-s. 2 in cases of non-delivery where there is a market for the goods. 2. Ghiron had no power to cancel the contract between the appellants and the respondents. 3. The contract between the appellants and Ghiron is to be found in the sold note sent from Hull, and not in the broker's note, and by the terms of the Hull note the appellants were not bound to deliver the cargo unless they got delivery of a similar cargo from the respondents. Therefore Ghiron never had any right to damages against the appellants because there was no breach of the contract with him, and, consequently, he had no rights to assign to the respondents. 4. Assuming that the contract is to be found in the broker's note only, the umpire had no jurisdiction to deal with any cross-claim of the respondents derived from Ghiron. The Court of Appeal proceeded on the principle of avoiding circuity of action, but, apart from the objection that this was a matter which was outside the jurisdiction of the domestic tribunal, that principle is limited to cases where the damages are the same in character and amount, and there are many important divergences between Ghiron's contract and the original contract. That principle therefore has no application to the present case: 2 Williams' Saunders, p. 449, notes to *Turner* v. *Davies* (note q); *Charles* v. *Altin*. (3)

Leck, *K.C.*, and *W. Norman Raeburn*, for the respondents. 1. The House must deal with the facts as found by the umpire, and the umpire has found that the contract between the appellants and Ghiron is contained in the broker's note only. The respondents have become assignees in equity of the cargo which they themselves had contracted to deliver; they have acquired the full rights in that cargo subject only to paying the differences to the parties who have dealt with the coal. 2. The rule laid down in *Rodocanachi* v. *Milburn* (2) is not the true rule.

(1) [1911] A. C. 301, at p. 307. (2) 18 Q. B. D. 67.
(3) (1854) 15 C. B. 46.

The true principle is to indemnify the buyer against the loss that he has sustained. A buyer suffering from non-delivery is not entitled to anything beyond a complete indemnity: *Wertheim* v. *Chicoutimi Pulp Co.* (1) That was a case of delay in delivery, but there is no difference in principle between the measure of damage in that case and in the case of non-delivery. That is in accordance with the rule laid down in s. 51 of the Sale of Goods Act, 1893. Sub-s. 2 of that section gives the true measure of damages. It is "the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract." Sub-s. 3, which embodies the rule stated in *Rodocanachi* v. *Milburn* (2), is qualified by the words "prima facie." That rule only applies where the subsequent dealings with the subject-matter of the contract are res inter alios acta. Here they are not.

[THE LORD CHANCELLOR referred to *Great Western Ry. Co.* v. *Redmayne.* (3)]

If the peculiar circumstances relating to the breach are such that the plaintiff has in fact suffered less than the difference between the contract price and the market price at the time of the breach, then he is not entitled to the full market price.

The House took time for consideration.

Feb. 27. VISCOUNT HALDANE L.C. My Lords, the facts out of which this appeal arises may be stated shortly. The respondents sold to the appellants six cargoes of a certain coal to be shipped every two months in 1911. It is as to one of these cargoes, which was to be shipped in November, that the dispute arises. The price was to be 16*s.* 3*d.* per ton net, c.i.f., Genoa or Savona, or Spezzia, or Leghorn, orders to be given on signing bill of lading, or 17*s.*, c.i.f., Venice, on certain terms. The point to be decided relates to the cargo in question, which the respondents failed to ship, and is, What damages are payable by the respondents to the appellants on the facts as stated by the umpire in his award in an arbitration? The umpire, having

(1) [1911] A. C. 301. (2) 18 Q. B. D. 67.
(3) (1866) L. R. 1 C. P. 329.

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found the breach of contract, found further the following among other facts: That at the date of the breach the market price of the coal in question was 23*s.* 6*d.*; that about October 28, 1911, the appellants sold, through one Colonna, their agent at Genoa, a cargo of coal to one Ghiron on the terms of a sale note of that date, which I shall call the broker's note, at the price of 19*s.* per ton, and that the intention of the appellants was to resell to Ghiron the November cargo to be delivered to them by the respondents, and that they appropriated this cargo to their contract with Ghiron. That about October 31, 1911, the appellants sent to Ghiron a sold note dated October 28, 1911. That about November 28 in the same year Ghiron sold to the respondents the cargo referred to in the broker's and sold notes at 20*s.* a ton and by indorsement on the sold note ceded all his rights and liabilities under the contract with the appellants for 225*l.*, being 20*s.* per ton or 1*s.* per ton above the price which Ghiron had agreed to pay to the appellants. That by certain letters which the umpire referred to, Ghiron had given notice to the appellants that he cancelled the contract of the appellants with the respondents so far as it related to the November cargo, but that the appellants immediately repudiated Ghiron's right to so cancel. It was not found by the umpire, but was agreed between counsel at the hearing before the learned judge who heard the case, Bailhache J., that Ghiron signed and returned to the appellants a bought note, dated October 28, corresponding to the sold note referred to.

The contention of the appellants before the umpire was that the true measure of damages was 7*s.* 3*d.* per ton, being the difference in price, between 16*s.* 3*d.* the contract price, and 23*s.* 6*d.*, the market price at the date of the breach; 4500 tons at 7*s.* 3*d.* amounts to 1631*l.* 5*s.* The contention of the respondents was that the true measure of damages was 2*s.* 9*d.* per ton, being the difference between 16*s.* 3*d.*, the contract price, and 19*s.*, the price of the coals sold by the appellants to Ghiron; 4500 tons at 2*s.* 9*d.* amounts to 618*l.* 15*s.*

The umpire stated his award in the form of a special case under the provisions of the Arbitration Act, 1889. He appended, among other documents, those to which I have referred. He

also in his award expressed the opinion that "it is in accordance with trade equity and fair dealing that" the respondents "should be entitled to purchase the said P. Ghiron's contract with" the appellants "and cancel the whole transaction, paying the differences in prices, as was purported to be done."

Bailhache J. decided in favour of the appellants. He pointed out that, although the broker's note was silent on this point, the sold note, which was signed and returned by Ghiron, the purchaser, contained an additional term. It stipulated that the "sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them" from the respondents. He would, but for this term, have held that the respondents had the right to say to the appellants that the latter, who had not delivered to them the cargo which they had resold to Ghiron, the assignor of the respondents, were liable to the respondents for the difference between 19*s.* and 23*s.* 6*d.* as the umpire had found. But he thought that under the additional term incorporated in the sold note the appellants had no obligation to deliver unless they had first got delivery from the respondents, and that as they had not got such delivery the cross-claim of the respondents failed. For the rest, he thought that in ascertaining the measure of damages he ought to follow the judgment in *Rodocanachi* v. *Milburn*. (1)

The majority in the Court of Appeal (Vaughan Williams L.J. and Bray J.) took a different view. Following the finding of the umpire, they considered that the sold note given by the broker Colonna governed the contract, and that as it did not contain the additional term which Bailhache J. had thought decisive, making the obligation of the appellants to deliver to Ghiron conditional on their getting delivery under their contract with the respondents, the latter had, by their assignment from Ghiron, become assignees of an unqualified contract of sale and delivery by the appellants. They held that it was open to them to decide that, on the principle of avoiding circuity of action, the amount which the respondents were thus entitled to recover from the appellants, being damages representing the difference between 19*s.*, Ghiron's contract price, and 23*s.* 6*d.*, the

(1) 18 Q. B. D. 67.

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market price, must be deducted from the difference between 16*s.* 3*d.* and 23*s.* 6*d.* They therefore gave judgment to the effect that the amount due to the appellants was the sum of 618*l.* 15*s.* only, instead of 1631*l.* 5*s.* which they had claimed.

Hamilton L.J. dissented. He agreed that Bailhache J. was wrong in departing from the finding of the umpire that the broker's note given by Colonna governed the transaction of October 28. But he was unable to agree with his colleagues that the respondents so stood in the shoes of Ghiron, that if the appellants failed to deliver to them the respondents could claim against them the excess over the 19*s.* per ton at which Ghiron had bought. He considered that as no coals had been shipped by the respondents and appropriated to their contract, no property of any kind passed, but the right remained a contractual one in respect of unascertained goods. He pointed out the divergences between the terms of Colonna's contract note and those of the original contract between the appellants and the respondents, and further that there was no finding in the award of an assignment of the original contract to the respondents. He went on to add that no such case appeared to have been either raised before the umpire or established by his award. All that the umpire had really decided was a question as to the measure of the damages payable by the respondents to the appellants for the breach of their original contract, and as to this it appeared on the face of the special case that he had suggested an opinion as to the proper measure of damages which was inconsistent with the law as laid down in *Rodocanachi* v. *Milburn.* (1)

My Lords, I have arrived at the conclusion that the view taken by Hamilton L.J. was the true one. It may be that we are precluded by the terms of the award from looking beyond its finding that the contract between the appellants and Ghiron was contained in the Colonna sold note. But the result is carried no further by the statement in the award that the appellants "appropriated" the cargo they had the right to claim to their contract with Ghiron. No doubt it must be taken that they

(1) 18 Q. B. D. 67.

intended to resell it to the latter. But what difference can this make? No property in the cargo had passed to them. Their right remained in contract, and was a right to damages. It appears to me to have prima facie remained intact, and if *Rodocanachi* v. *Milburn* (1) was correctly decided it was quite clear what they were entitled to claim. No doubt if they had assigned their contract to Ghiron, and Ghiron had in his turn assigned it to the respondents, the appellants' right would have been extinguished. But there is no finding to this effect in the award, and if I were at liberty to look for such a result outside the award I should be of opinion that on the materials before us it was impossible to hold that such an assignment had been made.

What really appears is that there were two separate contracts, on one of which the appellants were entitled to sue the respondents, and on the other of which the respondents could claim against the appellants. But the difference is that while as regards the first contract the respondents, who have been found to be in breach, have no answer, on the second there may or may not be a defence on the ground that this contract was to be satisfied out of the coal which the respondents failed to deliver. On this point I express no opinion. It was not before us, and it was not before the umpire. Nor would he have had jurisdiction to deal with it. What was referable to him under the original contract was any dispute as to "the meaning of any of the conditions thereof, or as to any matter arising out of this contract."

Indeed, his award purports to deal with the obligation of the respondents to deliver, and the measure of damages alone. If it is argued that he could have dealt with a question of the effect of any assignment which he had found as a fact in extinguishing pro tanto the title of the appellants to sue for a breach, the obvious comment is, first, that he found no such assignment, and, secondly, that in the absence of such an assignment the question is not one of reduction of the amount of damages, but one of a cross-action or counter-claim. Now, he deals with nothing of this kind, nor in my opinion would he have had jurisdiction to

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deal with it. What right, if any, the respondents may have they must therefore assert in other proceedings. For these reasons I have arrived at the same result on this point as Hamilton L.J.

But a wholly distinct point was taken in addition to the one I have now discussed. My Lords, it was argued for the respondents that, even assuming the appellants to be entitled to claim full damages from the respondents without deduction, the principle laid down by the Court of Appeal in *Rodocanachi* v. *Milburn* (1), which was accepted by the Courts below as binding them, was wrong. In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. He said that if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing, and that it would therefore be unjust if the market price did not govern when he had sold for less.

This decision is quite in harmony with what was recently said in this House in *British Westinghouse Co.* v. *Underground Electric Railways Co.* (2), where it was pointed out that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequence of the breach, and must not be of an independent character. I agree with the statement of the law in *Rodocanachi* v. *Milburn* (1), and with the view of this part of the present case taken by all the learned judges in the Courts below.

I will only add on this point that I do not think that the law so laid down has been affected by s. 51 of the Sale of Goods Act, 1893. By sub-s. 3 of the section the general principle is recognized as the rule which obtains prima facie, and I do not find in sub-s. 2 anything inconsistent with this recognition.

For the reasons I have given, I move that the judgment of the

(1) 18 Q. B. D. 67. (2) [1912] A. C. 673.

Court of Appeal be reversed, and that of Bailhache J. restored. The respondents must pay the costs in this House and in the Courts below.

LORD DUNEDIN. My Lords, this is an appeal arising upon an award put in the form of a special case. [His Lordship stated the facts as above and continued:]

My Lords, I will assume that the contract between Ghiron and Messrs. Williams is contained in the Colonna note alone. I am not satisfied of that. I am inclined to the view that, though the umpire stated that as a question of fact, he was in reality deciding a question of law, namely, that the Colonna note was not superseded by the formal bought and sold notes, and, if so, that he may be corrected, in which case I should agree with Bailhache J. But as there is a difference of opinion on this point I will pass it by, and assume that the Colonna note rules. I dismiss at once all argument founded on the expression "cede the original contract" and the affected cancellation by Ghiron of Agius' contract with Messrs. Williams. Not only do I entirely agree with Hamilton L.J. that we should require to know a great deal more as to the true significance of the Italian word which is represented by "cede"; but what is conclusive is that if there was assignation of the original contract, then Messrs. Williams had nothing left on which they could sue. Such a plea was never taken before the arbitrators, and the whole course of the arbitration is negative of its existence. What then is the position? Messrs. Williams have an action for breach of contract against Agius. Ghiron has an action for breach of contract against Messrs. Williams. Now, if the case of *Rodocanachi* (1) be good law, then Williams' damages as against Agius are to be measured by the difference of market price, unaffected by the fact that Williams had contracted to resell. But then it is said that even if that be so, yet inasmuch as Agius is in right as assignee of Ghiron's contract, he is entitled to make good his position without circuity of action as defence to the action brought against him. It is obvious that this is counter-claim and nothing else. Now, how far counter-claim is available as defence

(1) 18 Q. B. D. 67.

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is truly a matter of pleading. Different systems of law vary as to this power, and the same system of law will be found to vary at different dates of its development. But this at least is certain, that no counter-claim can be given effect to as a defence unless the Court dealing with the original action has also jurisdiction in the matter of the counter-claim. Now, here the Court dealing with the original action, namely, the arbitrators and umpire, only derives its jurisdiction from consent, and that consent is limited to matters arising out of the Agius-Williams contract. It has no jurisdiction whatever in the matter of the contract between Williams and Ghiron—and Agius can have no higher rights in respect of that contract than those possessed by his assignor, Ghiron. This consideration is, in my opinion, fatal to the conclusion reached by the majority of the Appeal Court.

It was, however, argued at your Lordships' Bar that the case of *Rodocanachi* (1) was wrongly decided, and it was said to be in conflict with the principles laid down in the recent case before the Privy Council of *Wertheim* v. *Chicoutimi Pulp Co.* (2) It is certain that Lord Atkinson, who delivered the judgment in that case, did not think that he was going against *Rodocanachi's Case* (1), for he says so in terms. Nor, in my mind, is there any discrepancy between the two judgments. *Wertheim's Case* (2) was a case, not of delivery withheld, but of delivery delayed. The buyer, therefore, got the goods, and the only damage he had suffered was in delay. Now, delay might have prejudiced him; but the amount of prejudice was no longer a matter of speculation, it had been put to the test by the goods being actually sold; and he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got

(1) 18 Q. B. D. 67. (2) [1911] A. C. 301.

owing to a forward resale at over the market price (*Great Western Ry. Co.* v. *Redmayne* (1)), nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.

The general principle is expressed by the learned judges in both cases in identical words. Erle C.J., Willes, Keating, and Montague Smith JJ., in *Redmayne's Case* (1) say: "The market value of the goods was the value in the market, independently of any circumstances peculiar to the plaintiff (the buyer)." And the very same phrase is used in the counter case of *Rodocanachi* (2) by Esher M.R. and Lopes L.J. Lindley L.J. says that there is no difference between the two cases.

The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns.

I am therefore of opinion that the appeal should be allowed and the judgment of Bailhache J. restored.

LORD ATKINSON. My Lords, I concur.

By the seventh clause in the contract dated June 25, 1910, entered into between the parties to this appeal, which for convenience' sake may be styled the principal contract, it is provided

(1) L. R. 1 C. P. 329. (2) 18 Q. B. D. 67.

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that "in the event of any dispute between the parties as to the meaning of any condition thereof, or as to any matter arising out of this contract, such dispute shall be referred to two arbitrators and an umpire."

The cargo which should have been shipped in November never having been shipped, the two following disputes arose between the parties: (1.) as to whether the vendors were bound to deliver this cargo in November, 1910; and (2.) if so bound, what was the measure of the damages which the respondents ought to pay to the appellants in respect of the former's breach of contract in failing to deliver the cargo.

These disputes were obviously conversant with matters arising out of the contract. They were accordingly referred to arbitration. The arbitrators failed to agree, and a gentleman named James Horace Beckingham was duly appointed umpire. He found, as he must have found, that the respondents were by their contract bound to deliver the cargo in November, 1910, and no question arises as to the propriety of that finding. A controversy did arise, however, before him as to the second dispute, the measure of damages. It was found, and not disputed, that the market price of coal of the kind contracted for was at the time of the breach of contract 23*s.* 6*d.* per ton. And if nothing further had occurred in the case, it is well established that the measure of damages would have been the difference between that contract price and this market price, that is, 7*s.* 3*d.* per ton on 4500 tons or 1631*l.* 5*s.* in all: *Williams* v. *Reynolds* (1); *Rodocanachi* v. *Milburn* (2); *Wertheim* v. *Chicoutimi Pulp Co.* (3)

Something further, however, did occur. The appellants on October 28, 1911, entered into a contract in writing with one P. Ghiron, an Italian residing or carrying on business in Turin, to sell to him, at 19*s.* per ton, the cargo of coal which the respondents had contracted to ship in the month of November. This contract may for convenience be styled the sub-contract. The respondents had no notice or knowledge of its existence until they received the appellants' letter written from Hull dated November 1, 1911.

(1) 6 B. & S. 495. (2) 18 Q. B. D. 67.
(3) [1911] A. C. 301, at pp. 307, 308.

Some controversy arose as to whether this latter contract was contained in a certain sold note written in Turin, dated October 28, 1911, signed by one Ferdinando Colonna, acting on the instructions of one Conti, the appellants' broker, and sent by Colonna to P. Ghiron, or in a sale note of the same date sent from Hull by the appellants to P. Ghiron, and returned by the latter signed by him, or in the two documents taken together.

The substantial difference between the two documents consists in this, that the first, unlike the second, contains a provision to the effect that the appellants cede the original contract of the respondents with them to Mr. Ghiron, and that he should have the right to cancel the contract thus made with him if "the steamer" should not be loaded within 100 days from October 27, 1911; whereas in the second, several matters not alluded to in the first, such as strikes, &c., are dealt with, no mention is made of the ceding of the original contract, and a new clause is introduced expressly providing that the sellers, i.e., the appellants, are not under any obligation to deliver the cargo sold, unless they themselves get the delivery of a similar cargo from the respondents, and further that if the appellants have not chartered a boat within 100 days from October 28, 1911, P. Ghiron should have the option of cancelling "the purchase."

The respondents, having apparently come to the conclusion that they could not, or would not, perform their part of the original contract, conceived the idea that if they could procure a virtual assignment from P. Ghiron to themselves of the benefit of the sub-contract they could, in Ghiron's name, take advantage of the clause giving him power to cancel the sub-contract. They may, in addition, possibly, have thought that if, by reason of the clause as to "ceding" contained in the sale note signed by Colonna, Ghiron could be treated as the assignee of the benefit of the first contract, the subsequent assignment from Ghiron to themselves would not only vest in them the benefit of the sub-contract, but also place them towards themselves under the principal contract in the same position as that in which the appellants stood to them under that contract.

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Accordingly one finds indorsed on both the sale notes the following indorsement:—

"In consideration of having received from Messrs. Ed. T. Agius, Ltd., through Mr. Spreafico 225*l.*, I cede to them from the date I receive the sum all my rights under this contract."

Acting under this belief the respondents wrote to the appellants on December 9 informing them, in effect, that they (the respondents) had through their agents in Genoa cancelled the sub-contract and were ready to pay to the appellants the difference between the selling price of the coal under the two contracts. This difference amounts to 618*l.* 15*s.*

On December 18 Ghiron wrote to the appellants, stating in effect that at the respondents' request the sub-contract had been cancelled directly with the respondents.

The umpire made his award on June 24, 1912, in the form of a special case. In the fourth paragraph he refers to the sale notes dealing with the sale by the appellants to Ghiron, and in reference to these finds as facts that both the notes referred to the same transaction and the same cargo of coals, and that the sum of 225*l.*, mentioned in the indorsements already referred to, was paid on or about December 19, 1911. In paragraph 7 he sets out the contention of the appellants, namely, that their contract with Ghiron was contained in the second sale note alone; that this contract was in no way relevant to the matters in dispute; that no circumstances were proved which were sufficient to relieve the respondents from the obligation to deliver the November cargo, and that the proper measure of damages was the difference between the contract price of 16*s.* 3*d.* per ton and 23*s.* 6*d.* per ton.

In the eighth paragraph he sets out the contention of the respondents, to the effect that the appellants having resold the cargo to Ghiron at 19*s.* per ton, the measure of damages was the difference between 16*s.* 3*d.* per ton and this sum.

In paragraph 9 he sets forth what purport to be his further findings of fact. He says he found as a fact it was the intention of the appellants to resell the November cargo to Ghiron, and that they had appropriated this cargo to their contract with Ghiron. This latter finding involves a misuse of language. It

is admitted there was no appropriation of this cargo to Ghiron's contract in the legal sense of the term. The property never passed. The matter rested in contract merely.

He further finds as a fact that the contract between the appellants and Ghiron was contained in the first sale note, that signed by Colonna dated October 28, 1911, apparently because the second sale note, bearing the same date and signed by both the contracting parties, was not sent out till the 31st of that month.

The contract between the parties being contained in written documents, the construction of those documents is a matter of law, not of fact. And the principle of law in reference to such matters is precisely the reverse of the principle upon which the umpire proceeded, namely this: that when the parties to a contract subsequently enter into a new contract dealing with the same subject-matter, the second contract either supersedes the first or so far as it is inconsistent with the first impliedly rescinds it: *Hunt* v. *South Eastern Ry. Co.*(1); *Patmore* v. *Colburn*(2); *Thornhill* v. *Neats.*(3) I do not think that the statement of the umpire that the first of these two documents contains the contract of the parties simply because of its priority in time is a finding of fact, properly so called, at all. There was no evidence whatever before him to shew that the second document was not treated as an operative instrument. The very fact that it had indorsed upon it a memorandum identical in terms with that indorsed upon the note signed by Colonna suggests the contrary; and if it was intended to be, and was treated as an operative instrument, then the contract of the parties is to be found either in it alone or in both documents taken together. He further finds, as a matter of fact, that P. Ghiron cancelled the sub-contract as far as he lawfully might, whatever that may mean, and, lastly, expresses the opinion that, in accordance with trade equity and fair dealing, the respondents were entitled to purchase Ghiron's contract with the appellants and cancel the whole transaction, paying the differences in prices, as was purported to be done. He then awards that the

(1) (1875) 45 L. J. (Q.B.) 87 (H. L.). (2) (1834) 1 C. M. & R. 65.
(3) (1860) 8 C. B. (N.S.) 831.

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respondents do pay to the appellants the sum of 618*l.* 15*s.* if the former's contention as to the measure of damages be right, or 1631*l.* 5*s.* if the appellants' contention as to the measure of damages be right.

Upon the face of this award it would appear to me that the umpire has dealt with several matters not covered by the reference to arbitration and quite severable from the matters in dispute.

I do not think the construction of these sale notes, or of the memoranda indorsed upon them, involving the meaning of the word "cede," according to the Italian law, could possibly be described as "matters arising out of the original contract."

If the respondents were in law the assignees of Ghiron's rights under the sub-contract, it may well be that in an action brought in a Court of law by the appellants against the respondents on the original contract, if the latter, as the assignees of Ghiron, had counterclaimed for damages for breach of the sub-contract as embodied in the sale note signed by Colonna, the sums recovered on the claim and counter-claim respectively being set off the one against the other, the sum of 618*l.* 15*s.* would have been the balance to which the appellants would have been entitled; but neither the arbitrators nor the umpire had in my view any jurisdiction to embark on any investigation of that kind. It is not covered by the reference to arbitration, nor moreover could any damages be awarded to the respondents on such a counter-claim if the provision to be found in the second sale note, to the effect that the sellers (the appellants) were not under any obligation to deliver the cargo to Ghiron unless they got delivery of a similar cargo from the respondents, formed, as in my opinion it certainly did, part of the contract between the parties.

I am not in a position to form any opinion as to what the term "cede" means in the Italian law. No evidence was given on the point. The umpire has not found as a matter of fact what it means. His finding of fact in paragraph 9 (*f*) does not, I think, amount to anything of the kind. I do not think he had any jurisdiction to decide the point. Bray J. held, as I under-

stand, that when used in the body of the first sale note the word is not equivalent to the word "assign" (Appdx., p. 39), while he seems to hold that where the same word is used in the indorsement it is effectual to work out a good equitable assignment of Ghiron's interest under the sub-contract to the respondents. Again Bray J. is apparently of opinion that the umpire's statement in paragraph 9 that P. Ghiron ceded to the respondents all his rights under the sub-contract is a finding of fact. With all respect I beg to differ. It is, in truth, as things stood a decision on a point of law—the construction of a written document. It can be no more, as the only evidence before the umpire on the point was the indorsement upon the sale notes themselves.

Bailhache J. was of opinion that the contention of the appellants was right, and that the sum of 1631*l.* 5*s.*, with the interest therein mentioned, should be awarded to them. Hamilton L.J., as he then was, concurred in that result. I agree with them. I think there is nothing in the case to make the principle of the decision in *Rodocanachi* v. *Milburn* (1) inapplicable to it, and that it is governed by that authority, the soundness of which has been many times recognized and never questioned. That case has, of course, no reference whatever to cases of the late delivery of goods as distinguished from their non-delivery. The attempt to apply an authority dealing with the late delivery of goods to the present case must arise from a confusion of thought.

On the whole, therefore, I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed, and the decision of Bailhache J. restored, and that this appeal should be allowed with costs.

Lord Moulton. My Lords, the question for the decision of your Lordships in this appeal is set out very plainly in the award, in the form of a special case, which forms the basis of this litigation. It is whether the appellants are right in their contention that the measure of damages put forward by them in

(1) 18 Q. B. D. 67.

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respect of the admitted breach by the respondents of the contract to deliver a cargo of coals in November, 1910, is correct. That contention is that the proper measure of damages is the difference between the contract price of 16*s.* 3*d.* per ton and the market price on the date of the breach of contract, which the arbitrator finds to be 23*s.* 6*d.* per ton.

Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established. The case comes under the rule laid down in the case of *Rodocanachi* v. *Milburn* (1), and regularly and repeatedly followed ever since, and ultimately embodied in the Sale of Goods Act, 1893, s. 51, sub-s. 3. The contention of the appellants is in accordance with that rule, and the question put to the Court in the special case must accordingly be answered in their favour.

This consideration is, in my opinion, sufficient to decide this appeal, but, in deference to the opinions expressed by the majority of the Court of Appeal, I propose to examine the matters which it is suggested make the measure of damages in the present case other than that given by the recognized rule to which I have already referred.

From the facts of the case as found in the award, and the documents therein referred to, we learn that the appellants made a contract to sell a cargo of coal to the Italian firm of P. Ghiron, and that they intended to fulfil that contract by the cargo to be delivered by the respondents in November. The price to be paid by the said P. Ghiron was 19*s.* per ton, and the respondents contend that it is the difference between 19*s.* per ton and the contract price of 16*s.* 3*d.* per ton which is the true measure of damages.

If these were the only facts of the case the contention of the respondents would be precisely that view of the damages in the case of an article purchasable in the market which was negatived by the decision in *Rodocanachi* v. *Milburn* (1). That case rests on the sound ground that it is immaterial what the buyer is

(1) 18 Q. B. D. 67.

intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled. But the respondents contend that there are certain further facts which are relevant to the dispute before the arbitrator, and which afford an answer to the above reasoning. To appreciate them it will be necessary to give in a little detail the circumstances attending and subsequent to the sale to P. Ghiron.

The sale was negotiated by a coal agent of the name of Colonna in Turin, who gave what is called a sale note. He appears to have been employed by Signor Conti, of Genoa, who acted as agent for the appellants, under instructions contained in certain letters annexed to the case. The so-called sale note bears date October 28, 1911. There is to be found in it an almost unintelligible passage on which the respondents greatly rely, which reads as follows in the translation: "Messrs. Williams cede the usual original contract of Messrs. Agius, who are the sellers to Messrs. Williams."

The respondents contend that this is an assignment of the contract between the appellants and the respondents. There is no evidence whatever of any authority in Colonna to make any such assignment, or that the parties at the time intended any such assignment. On the contrary, it is perfectly clear that the contract between the parties was contained in a formal bought note signed by P. Ghiron and an identical sold note signed by the appellants, and those bought and sold notes contain no reference to any assignment of the contract between the appellants and the respondents, but contain the following stipulation:—"Sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them by Messrs. Ed. T. Agius, Ltd., of London, but if sellers have not chartered

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a boat within one hundred days of date, buyers have the option to cancel purchase."

These bought and sold notes shew conclusively that the sale was not a sale of a specific cargo, but of a cargo of such a character as could be satisfied by the delivery of the cargo due in November under the contract between the appellants and the respondents. The appellants had no doubt the intention of using the cargo which the respondents were under contract to deliver to fulfil their contract with P. Ghiron, but were not bound so to do.

If these two identical notes signed by the parties constitute the contract between them, the respondents are forced to admit that their case cannot be supported. But they rely on a finding in the special case by the arbitrator to the effect that the contract between the appellants and P. Ghiron was in the terms of the earlier sale note. The award goes on to say that the sale note signed by the principal, P. Ghiron, was not sent out by the appellants until three days later. The respondents contend that this finding that the contract between the parties is contained in the earlier sale note is a finding of fact by the arbitrator which must be accepted by the Courts. In my opinion, this is not so. Quite apart from the question of the authority of Colonna to make the contract alleged to have been made in the earlier sale note, we find the principals subsequently drawing up and signing a formal written contract setting out the transaction. Under such circumstances the effective contract between the parties is the document which the principals have signed. The arbitrator, therefore, was guilty of an error in law in deciding that the contract was not contained in this formal contract. The cause of his error is easy to see. He was of opinion that because the formal contract was later than the original sale note, it was overridden by it; whereas it is precisely because the principals subsequently to the original negotiations elected to draw up and sign the formal contract that it is conclusive as to the nature of the transaction.

The subsequent events can be told very shortly. In December the respondents, learning of the negotiations between the

appellants and P. Ghiron, purported to buy from P. Ghiron the cargo of coal at the price of 20*s.*, and accordingly P. Ghiron, for the sum of 225*l.*, made over to them all his rights and obligations under the contract. On the basis of this assignment the respondents, purporting to be the assignees of their own contract with the appellants, proceeded formally to cancel it. They based on these facts a claim that the measure of damages is the difference between 16*s.* 3*d.* and 19*s.*, instead of the difference between 16*s.* 3*d.* and the market price of 23*s.* 6*d.*

I have already stated that, in my opinion, there was no assignment of the original contract to P. Ghiron, so that this reasoning has no basis of fact. But there is one overriding consideration which makes it immaterial to consider what would have been the position of the parties if there had been any such assignment. The tribunal before whom the parties appeared derived its authority from the arbitration clause contained in the original contract of sale between the appellants and the respondents, and it had no authority to decide any matters other than those "arising out of" that contract. The question whether subsequently to the making of that contract there was in fact any assignment of any portion of the rights under that contract to P. Ghiron is a matter entirely outside the scope of the arbitration, and the arbitrator had no jurisdiction to deal with it. Moreover the claim of the respondents to diminish the damages legally due under the contract is of the nature of a counter-claim based on rights acquired subsequently to the contract by transactions with third parties. Whether or no in the Courts of the realm such matters could be brought in as an answer pro tanto to the appellants' claim with a view to avoid circuity of action is immaterial. No such course is permissible to a domestic tribunal of limited authority. The arbitrator ought, therefore, to have refused to go into any of the matters relating to the transactions between the respondents and P. Ghiron, and to have confined himself to deciding the measure of damages under the contract independently of all such questions.

I am of opinion, therefore, that this appeal should be allowed, and that the appellants should have the costs here and in the Courts below.

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LORD PARKER OF WADDINGTON. My Lords, I concur, and I have nothing to add.

Order of the Court of Appeal reversed and order of Bailhache J. restored: Respondents to pay the costs in the Courts below and of the appeal to this House: Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this order.

Lords' Journals, February 27, 1914.

Solicitors for appellants: *Ince, Colt, Ince & Roscoe, for A. M. Jackson & Co., Hull.*

Solicitors for respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914. *April* 7.

FELSTEAD . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

Criminal Law—Appeal—Special Verdict of Guilty but insane—Right of Appeal—Trial of Lunatics Act, 1883 (46 & 47 *Vict.* c. 38), *s.* 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

A special verdict given under the Trial of Lunatics Act, 1883, is one and indivisible and is a verdict of acquittal. Therefore an accused person who by the special verdict is found guilty of the act charged but insane at the time is not a convicted person within s. 3 of the Criminal Appeal Act, 1907, and cannot appeal from that part of the verdict which finds that he was insane at the time of doing the act.

Rex v. *Ireland* [1910] 1 K. B. 654 overruled.

Rex v. *Machardy* [1911] 2 K. B. 1144 followed, but the reasoning of the decision disapproved.

Decision of the Court of Criminal Appeal affirmed on other grounds.

APPEAL from a decision of the Court of Criminal Appeal (Sir Rufus Isaacs C.J. and Bray and Lush JJ.).

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD READING.

The appellant was tried at the Derby Assizes before Rowlatt J. on a charge of wounding his wife with intent to do her grievous bodily harm. The jury found the prisoner guilty of the act but insane at the time, and an order was made for his detention during His Majesty's pleasure. The appellant appealed to the Court of Criminal Appeal against that part of the verdict which found him insane at the time of doing the act.

The Court, on the authority of *Rex* v. *Machardy* (1), dismissed the appeal.

The appellant, having obtained the certificate of the Attorney-General, appealed to this House.

1914. Feb. 26. *Charles A. McCurdy*, for the appellant. The question is whether a person who has been found guilty but insane has a right of appeal under the Criminal Appeal Act, 1907, in respect of that part of the verdict which finds him insane. The appellant is willing to serve a term of imprisonment, but he does not wish to be detained during the King's pleasure in a criminal lunatic asylum. The question depends upon what is the effect of a special verdict under the Trial of Lunatics Act, 1883, which provides that, when insanity is set up as a defence and it appears to the jury that the accused did the act charged but was insane at the time when he did it, they must find specially that the accused is guilty of the act but was insane at the time. That is a finding that the prisoner is guilty of a crime but is relieved from responsibility for it on the ground of insanity. That, it is submitted, is a conviction which gives the prisoner a right of appeal under the Act of 1907. It will be said that this finding is in effect not a conviction but an acquittal—that it is a finding, not that the prisoner has committed the offence charged, but only that he has done the substantive act which if coupled with a mens rea would be an offence, and that it negatives the commission of the crime. But the doctrine of mens rea has nothing whatever to do with the defence of insanity. A person when he becomes insane does not take leave of his ordinary passions or cease to be guided by ordinary motives. From the earliest times insanity has never been a defence in

(1) [1911] 2 K. B. 1144.

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the sense that it negatived the crime; it does not negative guilt, but it absolves the prisoner from the consequences of the crime. In olden days insanity was no defence to a criminal charge, but it entitled the prisoner as of right to a free pardon: Stephen's History of the Criminal Law of England, vol. ii., p. 151. Then followed the second stage in the history of this procedure when it was open to the jury either to give a special verdict upon which the Court would give judgment of acquittal or to give a general verdict of acquittal to avoid circuity: Foster's Crown Law, 3rd ed., p. 279. That practice was put an end to by the Criminal Lunatics Act, 1800. That statute was passed because if a person was acquitted generally, the ground of acquittal being that he was insane, he could not be detained as a lunatic, but was allowed to go at large to the danger of the community. The Act accordingly directed that, on proof of a prisoner's insanity, the jury should state that he was acquitted on the ground of insanity, and provided for his detention during the King's pleasure. That was not a finding that there was no criminal intent, but was a finding that there was such intent but that the prisoner was absolved from the consequences of the crime: *Reg.* v. *Oxford* (1); *Reg.* v. *Davies.* (2) In the language of Lord Denman in the former case it amounted to a finding that the act had been done by the prisoner which fixed him as a criminal unless he was insane.

[LORD ATKINSON referred to *McNaghten's Case.* (3)]

There the prisoner was found not guilty, not upon the ground of the absence of any of the constituent elements of a crime, but on the principle that a person suffering from dementia was excused. Finally, the provisions of the Act of 1800 were replaced by the Act of 1883. There is no difference in the meaning of the two Acts, and the language was altered to express the construction put upon the Act of 1800 by Lord Denman and to make its meaning perfectly clear. In *Rex* v. *Ireland* (4), where the appeal was from the whole of the verdict, it was decided by the Court of Criminal Appeal that a special verdict under the Act of 1883 was a conviction and that there was a right of

(1) (1840) 9 C. & P. 525, at p. 550.
(2) (1858) 1 F. & F. 69.
(3) (1843) 10 Cl. & F. 200.
(4) [1910] 1 K. B. 654.

appeal. In *Rex* v. *Machardy* (1), upon which the Court proceeded in this case, it was held, first, that the special verdict was a conviction, but, secondly, that there was no right of appeal from that part of the verdict which found the prisoner insane. It is submitted that that case was wrongly decided, for under such a verdict the prisoner is detained, not as a lunatic, but as a criminal lunatic, i.e., under both parts of the verdict. In *Rex* v. *Hill* (2) Darling J. commented adversely upon *Rex* v. *Machardy*. (1) The word "convicted" is a word of no very precise meaning, and if a man has been found guilty of the act charged he is convicted within the meaning of s. 3 of the Act of 1907. "Convicted" and "found guilty" are synonymous and convertible terms. The word "convicted" occurs in an Act the object of which was to prevent subjects of the Crown suffering injustice from the wrong findings of juries; therefore if the construction suggested is a possible construction it ought to be adopted because on no other construction can injustice be avoided. Upon the construction put forward by the Crown the accused might be perfectly innocent of the act charged and perfectly sane, yet he would have no right of appeal, and, inasmuch as the Act of 1907, by s. 20, abolishes writs of error and the existing procedure in respect of the granting of new trials in criminal cases, he might find himself in a worse position than if the Act had not been passed. If the finding of lunacy is set aside the other finding of guilty remains, and that appears to be the view of all the judges of the Court of Criminal Appeal. Any special verdict which results in the prisoner's being sentenced to deprivation of liberty is a conviction. [He also referred to *Reg.* v. *Tolson* (3) and Russell on Crimes, 7th ed., vol. i., p. 62, as to the meaning of mens rea and the effect of insanity upon criminal responsibility.]

Sir John Simon, *A.-G.* (with him *Branson* and *Tinsley Lindley*), for the respondent. A special verdict under the Trial of Lunatics Act, 1883, is not a conviction, and therefore there is no right of appeal from it. Suppose the accused is wrongly found to be

(1) [1911] 2 K. B. 1144.
(2) (1911) 7 Cr. App. Rep. 26.
(3) (1889) 23 Q. B. D. 168, at pp. 181, 185—188.

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insane, it is true that he is detained during the King's pleasure, but these lunatics are under constant observation, and it would not be either to the public advantage or to the advantage of the lunatic that there should be an appeal.

[LORD PARKER OF WADDINGTON. Suppose there is no evidence of crime but evidence of insanity and the jury find the accused guilty but insane ?]

If any question of policy is involved, that is for the Legislature, but this is a pure question of construction. The following propositions are submitted on behalf of the Crown. 1. Before 1800, if a jury were of opinion that the accused had done the act but was insane at the time they might either return a verdict of not guilty or return a special verdict on which a judge would enter a verdict and judgment of acquittal. [Upon this point he referred to Foster's Crown Law, 3rd ed., pp. 279, 282; Pollock and Maitland's History of English Law, 2nd ed., vol. ii., p. 479; and Blackstone's Commentaries, book iv. c. 2, pp. 20, 21.]

2. The Act of 1800 recognized that condition of things and confirmed it so far as regards the person's being acquitted, but provided that in all cases the jury should be required to find a special verdict. This Act, while providing for the detention of the prisoner, did not alter the legal result of the trial; it was not punitive but preventive.

3. The Act of 1883 makes no difference in substance, but says that the jury shall find the accused guilty, not of the offence, but of an act which would have been the offence if the accused had been sane at the time. That Act again recognizes that a man who has done an act which would otherwise have been a crime is not convicted if he is insane, for it speaks of him after the verdict has been found as "the accused" and treats him as a "person acquitted on the ground of insanity."

4. The Act of 1907 applies only to persons convicted, and the appellant is not a person convicted. Sect. 5, sub-s. 4, of the Act expressly deals with the converse case of a person who has been found guilty of a crime but who in the opinion of the Court of Criminal Appeal was insane at the time and enables the Court to quash the conviction and order the appellant to be kept in

custody as a criminal lunatic. The inference from that is that the Act did not intend to deal with the present case.

[He was stopped.]

Charles A. McCurdy replied.

The House took time for consideration.

April 7. LORD READING. My Lords, the appellant was indicted for wounding with intent to do grievous bodily harm. The jury returned a special verdict in accordance with s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the prisoner was guilty of the act charged in the indictment as an offence, but was not responsible for his actions at the time, and thereupon the learned judge made an order for the safe custody of the appellant, under s. 2, sub-s. 2, of that statute.

The appellant gave notice of appeal to the Court of Criminal Appeal against that part of the verdict which found that he was not responsible for his actions at the time of doing the act. The Court of Criminal Appeal held that they were bound to follow their decision in *Rex* v. *Machardy* (1), that they had no jurisdiction to hear and determine the appeal, and consequently dismissed it upon this ground. The appellant then applied to the Attorney-General for his certificate under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, who granted the application, and issued his certificate authorizing the appellant to appeal to your Lordships' House.

The sole question for the decision of this House is whether an accused person who, by the special verdict, is found guilty of the act, but insane at the time, can appeal to the Court of Criminal Appeal against that part of the verdict which finds that he was insane at the time of doing the act. If there is any right of appeal it can only be that conferred by the Criminal Appeal Act, 1907. This Act was passed to establish a Court of Criminal Appeal and to amend the law relating to appeals in criminal cases, and there is no right of appeal to the Court of Criminal Appeal, and no jurisdiction in that Court to hear an appeal unless the appellant can bring himself within that statute.

(1) [1911] 2 K. B. 1144.

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By s. 3 of the Criminal Appeal Act, 1907, "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal," and unless a person is "a person convicted on indictment," there is no right of appeal against the verdict or any part of it; therefore, the question is whether by reason of the special verdict under the Trial of Lunatics Act, 1883, or any part of such verdict, the accused is "a person convicted on indictment."

In order fully to understand the effect of such a special verdict it is well to examine the history of the law before the passing of the Trial of Lunatics Act, 1883.

In the earliest times proof of insanity when he committed the act charged did not entitle the accused to an acquittal, but to a special verdict carrying with it a right to a pardon. The same course was taken when the accused had killed a man by misadventure or in self-defence (see 1 Rot. Parl. 444, 3 Edw. 2 (1310), and Fitzherbert's Grand Abridgement, sub tit. "Corone," s. 351).

At a later period the jury in cases of insanity could either find a general verdict of not guilty, or a special verdict that the accused committed the act but that at the time he was non compos mentis, and thereupon the Court gave judgment of acquittal (see Hale's Pleas of the Crown, ed. of 1800, vol. i., p. 28, and Sir Michael Foster's Crown Law, 3rd ed., s. 1, p. 279). It is to be observed that in such cases the result of either a general or a special verdict was the acquittal of the accused, and in the words of the preamble of the subsequent statute of 1800, "it may be dangerous to permit persons so acquitted to go at large." In the public interest it became necessary to provide for the safe custody of the insane person notwithstanding the verdict of acquittal. Consequently the statute of 1800, 39 & 40 Geo. 3, c. 94, entitled "An Act for the safe custody of Insane Persons charged with Offences," was passed. It was there enacted "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the

commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the Court before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the Court shall seem fit, until His Majesty's pleasure shall be known."

The intention of the Legislature as manifested by this statute was to provide for the safe custody of persons who were found by the jury to be insane (*a*) at the time of committing the offence, or (*b*) upon arraignment, or (*c*) upon trial, or (*d*) upon being brought before any Court to be discharged for want of prosecution. In the last-mentioned case, it will be observed upon examination of s. 2 that if even a person brought before the Court to be discharged for want of prosecution should appear to be insane, the Court was empowered to impanel a jury to try his sanity, and if the jury found him insane, the Court could order his detention for safe custody during His Majesty's pleasure.

Under this statute the finding of the jury that the accused was insane at the time of committing the offence was not a conviction of any offence, but was an acquittal on account of insanity empowering the Court to order the safe custody of the accused during His Majesty's pleasure. The alteration in the law made with reference to a person insane at the time of committing the offence charged against him was that although he was acquitted of the crime he was detained as a lunatic. As Lord Denman C.J. said in *Reg.* v. *Oxford* (1), "the statute must mean that the jury are to find that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic," implying that if he is a lunatic he is not a criminal, and is not convicted of any offence.

The last stage was the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), which is the statute now applicable. It made no substantial difference in the administration of the law, except that it enacted that where upon evidence the jury are satisfied that the accused did the act charged, but was insane so as not to

(1) 9 C. & P. at p. 550.

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be responsible according to law for his actions at the time he did the act, they must return a special verdict to that effect. That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence. In other words, this verdict means that, upon the facts proved, the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and therefore could not have acted with a "felonious" or "malicious" mind, which is an essential element of the crime charged against him.

The indictment of the appellant was for "feloniously" and "maliciously" wounding Lilian Ann Felstead, with intent to do some grievous bodily harm. It is obvious that if he was insane at the time of committing the act he could not have had a mens rea, and his state of mind could not then have been that which is involved in the use of the term "feloniously" or "maliciously," for "crimen non contrahitur, nisi voluntas nocendi intercedat." It was further argued that, as the Trial of Lunatics Act, 1883, provided under s. 2 that where such a special verdict is found the accused should be kept in custody as a criminal lunatic, the Legislature must have intended the special verdict to operate as a conviction of a crime. In my judgment this contention is not well-founded. By the use of the term "criminal lunatic" the Legislature meant by a compendious reference to bring into operation the powers given under the statute of 1800 (23 & 24 Vict. c. 75) and later statutes, which provided for detention in certain asylums, and under certain conditions, both of persons found insane and acquitted under the afore-mentioned Act of 1800 and of convicted persons who became insane during confinement in prison.

It was also contended that, as by s. 20 of the Criminal Appeal Act, 1907, writs of error and other modes of bringing a verdict and judgment under review had been abolished, the Legislature must have intended to give a right of appeal to the Court of Criminal Appeal whenever such a special verdict was found. It must, however, be borne in mind that your Lordships are deciding the proper interpretation to be placed upon the words of the statute, and cannot extend the right of appeal to those

who, in your Lordships' opinion, are not persons "convicted on indictment."

My Lords, I have for these reasons come to the conclusion that the appellant is not a "person convicted on indictment." By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody is consequent upon the finding of insanity, and is not for a fixed period but during His Majesty's pleasure.

The effect of this conclusion is to affirm the decision of the Court of Criminal Appeal that they had no jurisdiction to hear and determine the appeal of the appellant. That Court arrived at this decision because of the judgment in *Rex* v. *Machardy* (1), which affirmed *Rex* v. *Ireland*. (2) In this last-mentioned case the Court of Criminal Appeal held that when a special verdict under the Trial of Lunatics Act, 1883, was found in reference to the accused he was "a person convicted on indictment," and therefore had a right of appeal under the Criminal Appeal Act, 1907. The Court was largely influenced to their conclusion by reason of the use of the word "guilty" in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a criminal act. If the requirement under the statute had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal.

Rex v. *Machardy* (1) was a decision of the majority of the Court (consisting of five judges) constituted to consider the case of *Rex* v. *Ireland* (2), and whether an appeal lay against such part of the special verdict as found the accused insane. The majority of the judges approved the decision of *Rex* v. *Ireland* (2), but held that an appeal could be brought only against the first part of the verdict, and that, as the second part was in aid and relief of the accused, he could not appeal against it. Thus the Court divided the verdict into two parts, and held that no appeal lay against that part relating to insanity. The special verdict is, in my opinion, one and indivisible by reason of the statutory provision and takes the place of the general

(1) [1911] 2 K. B. 1144. (2) [1910] 1 K. B. 654.

H. L. (E.) 1914 FELSTEAD v. REX. Lord Reading.

verdict of "Not guilty," and is a verdict of acquittal of the accused.

It is worthy of observation that if the appellant succeeded in his present contention, and established on the hearing of the appeal that the verdict as to insanity should be set aside, he would be entitled forthwith to be set at liberty, for the remaining part of the verdict could not justify the passing of any sentence upon him, as it does not find him guilty of having committed an offence, but only of having done the act charged.

My Lords, I am of opinion, for the reasons given, that this appeal should be dismissed.

LORD ATKINSON. My Lords, I concur in the judgment which has just been delivered by my noble and learned friend, and I have been requested by Lord Dunedin and Lord Parker to express on their behalf their concurrence also.

VISCOUNT HALDANE L.C. My Lords, I also concur in the judgment of my noble and learned friend Lord Reading, and Lord Moulton has asked me to intimate to your Lordships that he concurs in the opinion that has been delivered.

Order of the Court of Criminal Appeal affirmed and appeal dismissed.

Lords' Journals, April 7, 1914.

Solicitor for appellant: *P. Wellington Taylor.*
Solicitor for respondent: *The Director of Public Prosecutions.*

[HOUSE OF LORDS.]

THE KING . . . . . APPELLANT;

AND

CHRISTIE . . . . . RESPONDENT.

H. L. (E.)*
1914
April 7.

Criminal Law—Evidence—Admissibility—Statement made in Presence of Accused.

Considered. LEJZOR TEPER v. THE QUEEN [1952] A.C. 480

There is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement; but where the accused denies the truth of the statement the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value and might unfairly prejudice the jury against the accused, it ought not to be admitted.

The respondent was convicted of an indecent assault upon a little boy. At the trial the boy's mother stated in evidence that, as she and her son came up to the respondent shortly after the act complained of, the little boy said in the respondent's hearing "That is the man" and described what the respondent did to him, and that the respondent replied "I am innocent." The Court of Criminal Appeal quashed the conviction upon the authority of *Rex* v. *Norton* [1910] 2 K. B. 496, on the ground that evidence of a statement made in the presence of the accused was not admissible against him unless he acknowledged the truth of the statement:—

Held, that the evidence was admissible in law in reference to the demeanour of the respondent, and by Lord Atkinson, with the concurrence of Lord Parker, (Viscount Haldane L.C., Lord Dunedin, Lord Moulton, and Lord Reading dissenting) as part of the act of identification.

Decision of the Court of Criminal Appeal reversed on this point, but the order quashing the conviction affirmed on the ground of misdirection by the presiding judge on the question of the corroboration required by s. 30 of the Children Act, 1908.

Rex v. *Norton* [1910] 2 K. B. 496 considered.

APPEAL from an order of the Court of Criminal Appeal (Sir Rufus Isaacs C.J., Darling and Atkin JJ.).

The respondent was convicted at the Middlesex Sessions upon a charge of indecently assaulting a little boy aged five.

At the trial the boy's mother was called and stated that on

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY (during the argument only), LORD DUNEDIN, LORD ATKINSON, LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD READING.

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July 25, 1913, her boy went out to play in the fields at 10 o'clock in the morning and returned at 10.30; that he came back screaming and with his dress disarranged; that she took him across the fields and had a conversation with a man who was working there, and that the prisoner was fetched back. Asked whether the little boy said anything in the hearing of the prisoner, she replied "Yes."

Counsel for the respondent objected to the evidence of what the little boy said and the mother was ordered to stand down until after the little boy had been called.

The little boy gave his evidence without being sworn, in accordance with s. 30 of the Children Act, 1908. He described the assault and identified the prisoner in Court. He was asked no questions as to any previous identification and he was not cross-examined. The mother was then recalled and was again asked whether the little boy said anything in the prisoner's presence. Counsel for the respondent repeated his objection and cited *Rex* v. *Norton*. (1)

The deputy chairman overruled the objection.

The mother then said that as she and her son were going towards the prisoner he said "That is the man, mum"; that a police constable who was on the spot asked him "Which man?" and made him go right up to the man and identify him; that the little boy said "That is the old man, mum, who"—and then he described what the prisoner did to him; that the prisoner replied "I am innocent." She was not cross-examined.

The police constable was called and confirmed the mother's story. He said that the little boy went up to the prisoner and touched him on the sleeve and said "That is the man," describing the nature of the assault, and that the prisoner replied "I am innocent." He was cross-examined, but his evidence on this point was not affected.

The Court of Criminal Appeal, on the authority of *Rex* v. *Norton* (1), held that evidence of the statement made by the boy in the prisoner's presence was improperly admitted inasmuch as the prisoner had denied the truth of the statement, and quashed the conviction.

(1) [1910] 2 K. B. 496.

The Crown, having obtained the certificate of the Attorney-General required by s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, appealed to the House of Lords.

1914. Feb. 26, 27. *Sir John Simon*, *A.-G.* (with him *Branson*, *Comyns Carr*, and *Purchase*), for the appellant. The question is under what circumstances evidence of a statement made in the presence of the accused is admissible. It is not intended, if the appeal succeeds, to take any further proceedings against the respondent, but the object of the appeal is to obtain a final pronouncement of the law upon a matter of great importance in the daily administration of criminal justice. The evidence of the mother and policeman as to what the little boy said is admissible on several grounds. 1. It is admissible as evidence of identification. The defence raised here was that this was a case of mistaken identity, and whether the identification of the prisoner by the boy was by word of mouth or by action is immaterial. Inasmuch as the issue in the case was whether the prisoner was the man or not, and inasmuch as the child at the trial said he was the man, it is permissible to admit a statement by the child that he was the man, made within a few minutes of the occurrence. 2. Evidence of what the child said in the presence of the accused and of the answer of the accused thereto is admissible in reference to the demeanour of the accused. By the law of this country it is the duty of the prosecution to state all the relevant facts, and if the evidence of the boy's statement would be admissible if the accused acknowledged the truth of the statement, how is it inadmissible when he denies it? The admissibility of the evidence cannot depend upon the answer of the accused. The Court of Criminal Appeal have held, on the authority of *Rex* v. *Norton* (1), that evidence of a statement made in the presence of the accused is not admissible against him unless he acknowledges the truth of the statement. That case was wrongly decided and ought to be overruled. The decision proceeds upon no intelligible principle and is based upon a misapplication of a passage in Taylor on Evidence, 10th ed., vol. i., § 814, which was concerned only with admissions by the accused.

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[EARL OF HALSBURY. I should have thought that that decision was a serious violation of the principles of law.]

3. A statement made by the prosecutor immediately after the Act complained of is admissible as corroborating the genuineness of his belief in the truth of the accusation: *Reg.* v. *Lillyman.* (1) The rule against hearsay evidence has been misunderstood. By the law of England evidence is not admissible through the mouth of one witness to shew what a third person said for the purpose of proving the truth of what that third person said, (*a*) because to admit such evidence would be to accept the statement of a person not on oath, and (*b*) because that person could not be cross-examined on his statement. But the evidence may be admitted upon some other principle. The maxim "Hearsay is no evidence" should be "Hearsay is no evidence of the truth of the thing heard." And just as the term "hearsay" is misused so the expression "corroboration" is not always used very precisely. You do not corroborate the truth of a statement by saying that it was made before—repetition is not corroboration. But you do corroborate the allegation that the accusation is not a recent invention by saying that it was made at the time of the act complained of. [He referred to *Rex* v. *Hedges.* (2)] In trying the issue whether the accusation is true it is not relevant to say that it was made face to face with the accused shortly after the event, but the statement is relevant as establishing the consistency of the accuser's conduct in reference to the complaint. It is a matter of great importance upon this point to know that immediately after the occurrence the little boy told his mother what had happened.

[LORD READING referred to *Reg.* v. *Rowland* (3) and *Reg.* v. *Smith.* (4)

VISCOUNT HALDANE L.C. referred to *Reg.* v. *Wood.* (5)]

The authorities upon the point are not consistent.

Dickens, K.C. (with him *Bryan*), for the respondent. If the statement in question had been limited to identification it might have been admissible, but this statement goes on to describe the

(1) [1896] 2 Q. B. 167.
(2) (1909) 3 Cr. App. Rep. 262.
(3) (1898) 62 J. P. 459.
(4) (1897) 18 Cox, C. C. 470.
(5) (1877) 14 Cox, C. C. 46.

details of the offence. The danger of admitting such a statement is that the jury, however much they may be warned by the judge, do in fact attach importance to it as evidence of the truth of the facts stated, and the prisoner is seriously prejudiced thereby. Whether the rule laid down in *Rex* v. *Norton* (1) be treated as a rule of law or a rule of practice, that decision is right in substance. Take the case of rape. The absence of consent is a material part of the case for the prosecution. It is the universal practice to require some corroboration of the girl's story on that point—such as bruises on the body or complaint made at the time. The judge must warn the jury that it would be dangerous to convict without corroboration, and if he simply left it to the jury to determine the truth of the girl's story a conviction so obtained could not stand. Or take the case of evidence by an accomplice. There again corroboration is always required. That began as a rule of practice, but by constant iteration it has become crystallized into a rule of law. Judges who administer the law and legislators who reform the law have always been zealous in guarding the interests of the accused and in preventing the assimilation of the procedure in a criminal trial to that of a civil action. This is not the case of a conversation with the prisoner; it is simply a statement made in the presence of the prisoner which he may admit or deny. If this were a mere question of identification it would not be unreasonable that some one should prove that the accuser had identified the prisoner before, but this statement goes far beyond that. Then on what ground can it be admissible? It cannot be admissible as part of the res gestæ, for it was not part of the act but the narration of the act: *Reg.* v. *Bedingfield* (2); *Reg.* v. *Goddard* (3); *Reg.* v. *Nicholas* (4); *Rex* v. *Foster* (5); *Reg.* v. *Wainwright* (6); *Reg.* v. *Pook.* (7)

[LORD READING. This point was not argued by the Attorney-General.]

If the statement is not admissible as evidence of facts going to identity or as part of the res gestæ, the only other principle upon

(1) [1910] 2 K. B. 496.
(2) (1879) 14 Cox, C. C. 341.
(3) (1882) 15 Cox, C. C. 7.
(4) (1846) 2 Car. & K. 246.
(5) (1834) 6 C. & P. 325.
(6) (1875) 13 Cox, C. C. 171.
(7) (1871) 13 Cox, C. C. 172, n.

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which the statement can be admitted is where the prisoner acknowledges the truth of it, so that it becomes an admission by him. But here the prisoner denies the truth of the statement. There is therefore no ground upon any principle of law or justice on which this statement ought to be admitted. With regard to consistency of complaint, that raises a very serious question, and it is submitted that evidence on that head is only admissible after cross-examination tending to shew that the accusation was an afterthought.

[VISCOUNT HALDANE L.C. intimated that their Lordships did not propose to deal with that question upon the present appeal.]

The order quashing the conviction ought to be affirmed on the ground of misdirection by the deputy chairman. First, he omitted to warn the jury that under s. 30 of the Children Act, 1908, the little boy's evidence required corroboration, and, secondly, he told the jury that the evidence of the mother and police constable was a corroboration of the little boy's story.

Branson replied.

The House took time for consideration.

April 7. VISCOUNT HALDANE L.C. My Lords, I have had the advantage of considering the opinions which three of your Lordships are about to express. For the special reasons given by my noble and learned friends Lord Atkinson and Lord Reading I agree that the judgment of the Court of Criminal Appeal quashing the conviction should be affirmed. But the important question is not the minor one as to whether the particular direction given by the deputy chairman to the jury was open to exception on special grounds, but whether the general law laid down in the case as to the statement of the boy alleged to have been indecently assaulted was rightly laid down. In the opinions about to be delivered by Lord Atkinson, Lord Moulton, and Lord Reading the true view of the law appears to me to be expressed. The only point on which I desire to guard myself is the admissibility of the statement in question as evidence of identification. For the boy gave evidence at the

trial, and if his evidence was required for the identification of the prisoner that evidence ought, in my opinion, to have been his direct evidence in the witness-box and not evidence of what he said elsewhere. On this point I share the doubt which I understand is to be expressed by my noble and learned friend Lord Moulton. Had the boy, after he had identified the accused in the dock, been asked if he had identified the accused in the field as the man who assaulted him, and answered affirmatively, then that fact might also have been proved by the policeman and the mother who saw the identification. Its relevancy is to shew that the boy was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake. But beyond the mere fact of such identification the examination ought not to have proceeded. Subject to this observation I concur in the judgments about to be delivered.

LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Criminal Appeal, dated October 27, 1913, whereby the conviction of the appellant under the 62nd section of the Offences against the Person Act, 1861, for indecently assaulting a boy named Frederick Butcher, of about five years of age, was quashed, and a verdict and judgment of acquittal directed to be entered upon the indictment upon which the appellant had been convicted.

The accused was then discharged from custody. The Attorney-General stated that there was no intention to re-arrest him, whatever the result of this appeal might be.

The questions of law arising on the appeal are: (1.) Whether a certain statement made by this boy Butcher in the presence and hearing of the accused and of a police constable was properly admitted in evidence; and (2.) whether, the child having been permitted under the powers of the 30th section of the Children Act, 1908 (8 Edw. 7, c. 67), by the deputy chairman, before whom the case was tried, to give evidence without being sworn, this judge had misdirected the jury in telling them that the statement so made by the boy in presence of the accused was, within the meaning of that section, material evidence

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implicating the accused, in corroboration of the boy's testimony given at the trial.

The little boy when examined as a witness proved what had been done to him, and identified the prisoner as the person who had done it, but was not asked any questions, and did not give any evidence in reference to any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. He was not cross-examined upon his evidence of identification given at the trial.

The boy's mother, Mrs. Charlotte Butcher, and Constable William Crooks were examined. The latter proved that he was stationed at Edmonton, and that, having received certain information, he went to a field off Winchester Road and saw a number of people, including the prisoner, Mrs. Butcher, and her son, standing there; that she made a complaint to him (the constable) that a man had assaulted her son; that the boy then said to his mother "That is the man, mum." Crooks then asked the boy which was the man, whereupon the boy went up to the accused, touched him upon the sleeve of his coat, and said "That is the man"; that he (the constable) then asked the boy, "What did he do to you?" In reply to which question the boy made a statement giving full particulars of the offence charged, and the accused replied "I am innocent."

The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds:—

(1.) As part of the act of identification, or as explanatory of it.

(2.) As a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour.

(3.) As proof of the consistency of the boy's conduct before he was examined with his testimony given at the trial.

(4.) As part of the res gestæ.

Your Lordships intimated during the course of the argument that you would not consider this third point. It is, therefore, unnecessary to allude to it further.

Of course, it will suffice for the Attorney-General's purpose if the statement be admissible on any of these grounds. It is, I

think, clear that the principle laid down in *Reg.* v. *Lillyman* (1) and in those cases which followed it, has no application to the present case. In these cases it was decided that, in rape and other sexual crimes committed against women, the statement of the prosecutrix, made in the absence of the accused, in the form of a complaint immediately, or soon after, the commission of the offence is admissible in evidence, even though the full details of the crime be stated. In *Reg.* v. *Lillyman* (1) consent was immaterial on the charge in the first count of the indictment, upon which alone the prisoner was convicted, though it was material on some of the other counts. It is admitted that such a statement is no evidence against the accused of the facts stated. There is some conflict between the authorities as to the particular grounds upon which such statements are admitted, but I think the general result of the cases is that the complaint is only admissible to negative consent. It is to be remembered that statements admitted under heads 1 and 4 are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statement, or of his intention in respect of them. They must, of course, in order to be admissible, be relevant to the issue, the guilt of the accused of the offence charged against him.

As to the first point, it cannot, I think, be open to doubt that if the boy had said nothing more, as he touched the sleeve of the coat of the accused, than "That is the man," the statement was so closely connected with the act which it accompanied, expressing, indeed, as it did, in words little if anything more than would have been implied by the gesture simpliciter, that it should have been admitted as part of the very act of identification itself. It is on the admissibility of the further statement made in answer to the question of the constable that the controversy arises. On the whole, I am of opinion, though not without some doubt, that this statement only amplifies what is implied by the words "That is the man," plus the act of touching him.

A charge had been made against the accused of the offence committed on the boy. The words "That is the man" must

(1) [1896] 2 Q. B. 167.

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mean "That is the man who has done to me the thing of which he is accused." To give the details of the charge is merely to expand, and express in words what is implied under the circumstances in the act of identification. I think, therefore, that the entire statement was admissible on these grounds, even although the boy was not asked at the trial anything about the former identification. The boy had in his evidence at the trial distinctly identified the accused. If on another occasion he had in the presence of others identified him, then the evidence of these eye witnesses is quite as truly primary evidence of what acts took place in their presence as would be the boy's evidence of what he did, and what expressions accompanied his act. It would, I think, have been more regular and proper to have examined the boy himself as to what he did on the first occasion, but the omission to do so, while the bystanders were examined on the point, does not, I think, violate the rule that the best evidence must be given. His evidence of what he did was no better in that sense than was their evidence as to what they saw him do.

As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them.

Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the

jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not, rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own, or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should be ultimately produced, to tell the jury to disregard the statement altogether?

In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice.

The course suggested by Pickford J. in *Rex* v. *Norton* (1), where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused.

The course pursued when accomplices are examined as witnesses is very analogous to that suggested. It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid: *Reg.* v. *Atwood* (2); *In re Meunier* (3); but it is a general rule of practice that judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion of the judge before whom a case is tried: *Reg.* v. *Stubbs* (4); *Reg.* v. *Boyes.* (5)

Again, if two persons are jointly indicted and tried together,

(1) [1910] 2 K. B. 496, at p. 500.
(2) (1788) 1 Leach, 464.
(3) [1894] 2 Q. B. 415.
(4) (1855) Dears. C. C. 555.
(5) (1861) 1 B. & S. 311.

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the statements made by each are generally only evidence against him who makes them. Under certain circumstances they may be evidence against both, but if they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding judge telling the jury that this is so. There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

The boy's statement was so separated by time and circumstance from the actual commission of the crime that it was not, I think, admissible as part of the res gestæ. In *Thompson and Wife* v. *Trevanion* (1), tried before Holt C.J., sitting at nisi prius, it was held that what a woman said immediately on a hurt being received by her, and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is here stated to rest on the absence of time or opportunity for concoction. In *Reg.* v. *Bedingfield* (2) a woman rushed out of a room with her throat cut almost through, made a statement to some women she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. Cockburn C.J. said the woman's statement was not admissible, "for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard." In other cases, such as *Rex* v. *Foster* (3), *Reg.* v. *Lunny* (4), the rule was applied with less strictness. I have found no authority, however, which would justify the admission of any part of the boy's statement as part of the res gestæ.

Even, however, if the boy's statement was admissible in evidence if properly dealt with, I think the verdict should be quashed. The deputy chairman never properly explained to the jury that it is what the accused accepts as his own of the statement

(1) (1693) Skin. 402.
(2) 14 Cox, C. C. 341.
(3) 6 C. & P. 325.
(4) (1854) 6 Cox, C. C. 477.

made in his presence that is evidence against him, not the statement itself. Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of the 30th section of the Children Act of 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification; this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more "material corroborative evidence in support of his evidence at the trial implicating the accused" than his would be.

The appeal, so far as it is directed to reverse the decision appealed from, should, I think, be dismissed, although the Crown have succeeded on the point as to the admissibility in evidence of the statement.

My Lords, I have been requested by my noble and learned friend Lord Parker to express his concurrence in this judgment.

LORD MOULTON. (1) My Lords, the evidence admitted in this case, the admissibility of which is the question raised by the appeal, consists of the statements of more than one witness as to one and the same event, namely, that which passed on the occasion when the little boy on whom the assault is alleged to have been committed came into the presence of the prisoner almost immediately after that assault is alleged to have taken place. For the purpose of considering the point it will suffice to take the evidence of one of these witnesses inasmuch as the same point is involved in each case. I will, therefore, select the evidence given by the boy's mother.

She says that she took the boy back to the field where the prisoner was standing and that he said in the prisoner's presence, pointing him out, "That is the man." The constable then

(1) Read by Lord Reading.

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asked, "Which man?" and the boy went up and touched the prisoner and said, "That is the old man who did so and so" (giving particulars of the assault). The prisoner said, "I am innocent."

The admission of this evidence has been defended on three grounds: (1.) that it was evidence of identification of the prisoner by the boy; (2.) that it was a statement made in the presence of the prisoner coupled with evidence of his behaviour on hearing the statement; and (3.) that it was relevant to the issue of "consistent complaint," and therefore admissible in the case of an offence such as an indecent assault committed on a small child.

My Lords, I do not propose to deal with the third ground because it is not necessary to do so for the purpose of deciding this appeal, and it raises very difficult questions which would be better decided in some case where the admission of the evidence turns directly on the point. I shall, therefore, confine myself to the first and second of the above grounds. They do not depend in any way on the youth of the person making the statement, and the issue is therefore free from the complications which might arise from the fact that he was a child of tender years.

Speaking for myself, I have great difficulty in seeing how this evidence is admissible on the ground that it is part of the evidence of identification. To prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to shew by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence.

There remains the second ground, namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for every one a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondent that an instance of this is the case of the accused being charged with the crime and denying it, or not admitting it.

It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime, and I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is

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relevant or not. If the prisoner admits the charge the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault and denies that he committed it, that fact might be distinctly relevant if at the trial his defence was that he did commit the act, but that it was in self-defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt. This is said to have been laid down as a rule of law in *Rex* v. *Norton* (1), and to have been followed by the Courts since that decision. If this be so, I think that the decision was wrong, but I am by no means convinced that it was intended in that case to lay down any such rule of law.

But while I am of opinion that there is no such rule of law, I am of opinion that the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him, whereas the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime might seriously prejudice the fairness of his trial. In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value. Subject to these words of caution, I am of opinion that this appeal should be allowed upon this point, because we have to decide upon the admissibility as a matter of law, and

(1) [1910] 2 K. B. 496.

so regarded I have no doubt that the evidence in question was rightly admitted.

I am, however, of opinion that the direction of the magistrate as to corroboration was wrong, and therefore, notwithstanding my opinion on the admissibility of the evidence, the conviction cannot stand.

LORD READING. My Lords, this is an appeal by the Director of Public Prosecutions from an order of the Court of Criminal Appeal whereby the conviction of Albert Christie for an indecent assault upon a boy aged five years was quashed upon the ground of misreception of evidence at the trial.

The Attorney-General informed your Lordships in his address that should this appeal be allowed, and the conviction be restored, it was not intended to take any further steps against Christie in respect of the sentence passed upon him.

The appeal is brought under the certificate of the Attorney-General (Criminal Appeal Act, 1907, s. 1, sub-s. 6) to obtain your Lordships' opinion as to the admissibility of certain evidence given in this case, which the Court of Criminal Appeal held to be inadmissible by reason of the decision of that Court in *Rex* v. *Norton*. (1)

At the trial, the mother of the boy stated in evidence that about 10 A.M. he left her, and that she next saw him about 10.30 A.M. After describing his then condition, she stated that she took him across the fields, and there saw a man with whom she had a conversation, and Christie was then fetched. She was asked whether the boy said anything in the presence and hearing of Christie; she answered in the affirmative, and objection was raised to the admission in evidence of the conversation. Her evidence was then interrupted and the boy was called. He related the story of the assault, and when asked by counsel if he could see the man in Court who committed it, he pointed to Christie. Counsel for the defence did not cross-examine.

The evidence of the mother was then resumed, and she was again asked whether the boy said anything in Christie's presence. Counsel for the defence again objected, and argued, upon the

(1) [1910] 2 K. B. 496.

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authority of the Court of Criminal Appeal in *Rex* v. *Norton* (1), that the evidence was not admissible, inasmuch as Christie had denied the statement made in his presence. The deputy chairman was aware from the depositions of the nature of the statement and of Christie's answer to it. The evidence was admitted. The mother then stated that, as she and the boy were going towards Christie, the boy said "That is the man, mum." Crooks, a police constable, was standing close to Christie, and asked "Which man?" The boy went up close to Christie and said "That is the old man, mum," and proceeded to give a description of the acts done by Christie, who replied "I am innocent." Police constable Crooks, when called, said that the boy, in answer to the question "Which is the man?" went up to Christie, touched him on the sleeve, and said "That is the man." The police constable asked, "What did he do to you?" and the boy then gave an account of the various acts done by Christie (question 140), who answered, "I am innocent, I have been asleep in the fields since 8 o'clock last night." The only cross-examination was to elicit a repetition of the statement by Christie: "I am innocent." Christie was convicted, and appealed to the Court of Criminal Appeal. The Court was of opinion that it was bound to follow *Rex* v. *Norton* (1), and that the admission of the evidence was in contravention of the rule there formulated. It held that the evidence was inadmissible and quashed the conviction.

The Attorney-General submitted that this evidence was admissible, first, because it was part of the act of identification by the boy; secondly, because it was a statement made in the hearing and presence of Christie which had a bearing upon his conduct and demeanour at the time of hearing it; thirdly, because it proved that the boy's conduct after the offence was committed and before he gave evidence was consistent with the statements made by him at the trial; and, fourthly, because it was part of the res gestæ.

During the argument your Lordships intimated that it was not convenient on this appeal to consider the third ground, and there was no further discussion upon it.

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As to the first ground. No objection was raised by Mr. Dickens, for the respondent, to the admission of the first part of the statement, namely, "That is the man." It implied that Christie was the man designated by the boy as the person who had committed the offence, and meant little, if anything, more than the act of touching the sleeve of Christie or pointing to him. The importance is as to the admission of the additional words, describing the various acts done by Christie. These were not necessary to complete the identification or to explain it. There was no dispute that in the presence of his mother and the police constable the boy designated Christie as the man who had committed the offence. According to the constable's evidence the additional statement was made in answer to his question to the boy, "What did he do to you?" (Question 138.) At the trial, and before the statement was admitted, the boy identified Christie in Court, and was not cross-examined. The additional statement was not required by the prosecution for the purpose of proving the act of identification by the boy. The statement cannot, in my judgment, be admitted as evidence of the state of the boy's mind when in the act of identifying Christie, as that would amount to allowing another person to give in evidence the boy's state of mind, when he was not asked, and had not said anything about it in his statement to the Court.

If the prosecution required the evidence as part of the act of identification it should have been given by the boy before the prosecution closed their case. In my judgment it would be a dangerous extension of the law regulating the admissibility of evidence if your Lordships were to allow proof of statements made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification, more particularly when such evidence is not necessary to prove the act, and is not given by the person who made the statement. I have found no case in which any such statement has been admitted.

As to the second ground. A statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And

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equally such a statement made in the presence of the accused may be given in evidence against him at his trial.

The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon the evidence of an accomplice unless it is corroborated: see *Reg.* v. *Stubbs* (1); *Reg.* v. *Boyes* (2); *In re Meunier* (3); *Rex* v. *Wilson* (4); *Rex* v. *Blatherwick.* (5) Such a practice has also long existed in reference to the admissibility in evidence of such a statement as that now under consideration: see *Reg.* v. *Welsh* (6), and *Reg.* v. *Smith* (7), per Hawkins J., which the Court of Criminal Appeal refused to follow as a rule of law in *Rex* v. *Thompson.* (8)

Such practice has found its place in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the operation of indirect but not the less serious prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence. Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does

(1) Dears. C. C. 555.
(2) 1 B. & S. 311.
(3) [1894] 2 Q. B. 415.
(4) (1911) 6 Cr. App. Rep. 125
(5) (1911) 6 Cr. App. Rep. 281.
(6) (1862) 3 F. & F. 275.
(7) 18 Cox, C. C. 470.
(8) [1910] 1 K. B. 640.

not press for the admission of the evidence unless he has good reason for it.

That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest, for however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgment, for if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether. In *Rex* v. *Norton* (1) Pickford J., in delivering the judgment of the Court of Criminal Appeal, said at p. 500: "If there be no such evidence" (that is of acknowledgment by the accused), "then the contents of the statement should be excluded; if there be such evidence, then they should be admitted." If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think the judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the Court, with regard to the admission of such evidence, should be exercised, but it must not be assumed that the judgment in *Rex* v. *Norton* (1) exhausts all the circumstances which may have to be taken into consideration by the Court when exercising its judicial discretion.

It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in

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the particular case, notwithstanding that it did not amount either to an acknowledgment or some evidence of an acknowledgment of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred.

Upon the whole, therefore, I come to the conclusion that the rules formulated in *Rex* v. *Norton* (1), and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence.

I think, therefore, that this statement was in law admissible as evidence against Christie.

As to the fourth point. The statement under review formed no part of the incidents constituting the offence. It was not made whilst the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields and had spoken to another man. In my view it was not so immediately connected with the act of assault as to form part of the res gestæ. In the words of Cockburn C.J. in *Reg.* v. *Bedingfield* (2), "It was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

This ruling was given at the trial of an indictment for the murder of a woman when it was sought by the prosecution to give in evidence as part of the res gestæ a statement made by the deceased. It appeared that she, with her throat cut, came suddenly out of the house, and, pointing backwards to the house, made a statement to two women whom she employed. She had left the prisoner in the house, and his throat was also cut. She succumbed to the injuries within a few minutes after making the statement.

Cockburn C.J. refused to admit the statement, giving his decision in the words above quoted. Later he said, "It was

(1) [1910] 2 K. B. 496. (2) 14 Cox, C. C. 341.

something stated by her after it was all over, whatever it was, and after the act was completed." See also Cockburn C.J. in *Reg.* v. *Wainwright* (1), and Bovill C.J. in *Reg.* v. *Pook.* (2) In *Thompson and Wife* v. *Trevanion* (3) Holt C.J. held in a civil action that a statement by a woman immediately upon receiving the hurt in question in the action, and, as the report says, "before that she had time to devise or contrive anything for her own advantage, might be given in evidence." The decision rests upon the ground that the statement was made immediately upon receiving the injury. *Rex* v. *Foster* (4) is another instance of a statement made immediately after the event. There evidence was admitted of a statement as to the cause of the accident made by the deceased at the instant of receiving the injury. In *Reg.* v. *Lunny* (5), at a trial for murder, a girl heard a cry and then found the deceased, weak and injured, who made a statement immediately on her coming up to him. Monahan C.J. admitted it as part of the res gestæ. In this case the rule as to admissibility seems not to have been so rigidly enforced, but neither that case nor any of the authorities would support the admission of the statement in the case now before us.

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. The Court of Criminal Appeal acted upon the authority of *Rex* v. *Norton* (6) and did not think it necessary to consider any further point in the appeal. By virtue of s. 30 of the Children Act, 1908 (8 Edw. 7, c. 67), Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's

(1) 13 Cox, C. C. 171.
(2) 13 Cox, C. C. 172, n.
(3) Skin. 402.
(4) 6 C. & P. 325.
(5) 6 Cox, C. C. 477.
(6) [1910] 2 K. B. 496.

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evidence implicating the accused. This is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning of the statute, and then to direct them not to convict unless they accepted the evidence of corroboration. He did not give this direction, and, therefore, notwithstanding the view I have expressed about *Rex* v. *Norton* (1) and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed. I have been requested by Lord Dunedin to say that he concurs in this judgment.

Order of the Court of Criminal Appeal affirmed and appeal dismissed.

Lords' Journals, April 7, 1914.

Solicitor for appellant: *Director of Public Prosecutions.*
Solicitors for respondent: *Avery, Son & Fairbairn.*

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[PRIVY COUNCIL.]

CEDARS RAPIDS MANUFACTURING AND POWER COMPANY . . . . . } APPELLANTS;

AND

LACOSTE AND OTHERS . . . . . RESPONDENTS.

J. C.* 1913 Dec. 16, 17. 1914 Feb. 3.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC.

Compensation—Expropriation of Lands—Water Power—Value to Owners—Statutory Powers.

The appellants had powers under a statute of the Canadian Parliament to develop water powers in and adjacent to that part of the river St. Lawrence which includes the Cedars Rapids, and to expropriate lands required for that development; they had also obtained a lease of the river bed and the right to construct works therein and to abstract water. The respondents owned two islands, situated in the rapids, and rights, including water rights, over a promontory at the foot of the rapids. The appellants gave the respondents notice of expropriation in respect of the above properties:—

Held, that in assessing the compensation payable to the respondents it was not proper to treat the value to the owners of the lands and rights as a proportional part of the value of the realized undertaking which the appellants were proposing to carry out; that the proper basis for compensation was the amount for which the respondents' lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers.

In re Lucas and Chesterfield Gas and Water Board [1909] 1 K. B. 16 approved and applied.

APPEAL, by special leave, from three judgments of the Superior Court of Quebec (February 19, 1913), increasing the amounts payable under two awards of arbitrators and setting aside a third award.

The appellant company was incorporated by a statute of the Parliament of Canada in 1904, and was thereby empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges, in the Province of Quebec, and to take by way of expropriation lands

* *Present:* LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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within that parish actually required for those purposes. The provisions of the Railway Act, 1903 (now R. S. Can., 1906, c. 37), including those relating to the valuation and payment of compensation for taking lands, were incorporated with the appellants' Act.

By an agreement with the Dominion Government, dated May 28, 1909, the appellants were authorized to erect works in the bed of the river and to take 350,000 gallons of water from the river each second, and they further obtained from the Government of the Province of Quebec an emphyteutic lease for ninety-nine years of so much of the bed of the river as was within the limits of their undertaking.

The respondents, as executors and trustees, owned, within the limits of the appellants' Act, two islands in the river, namely, the Ile aux Vaches and the Ile Bédard, and certain rights over a promontory of land known as the Pointe du Moulin. The Ile aux Vaches was at the head of the Cedars Rapids and the Pointe du Moulin at the foot, the Ile Bédard being between. There was a fall of 28 feet in all from the head to the foot of the rapids. The respondents' rights upon the promontory were reserved by a conveyance made in 1879, and consisted of the reservation of a road and the right to erect a mill with the right to use the power of the water flowing by and over the land.

The scheme of the appellants' proposed works was to impound the water flowing down the river by constructing a dyke in its bed between the Ile aux Vaches, the Ile Bédard, and the Pointe, and to erect a power-house upon the Pointe.

In January, 1911, the appellant company served the respondents with notices of expropriation in respect of the two islands and their rights over the Pointe, offering to pay for the Ile aux Vaches $2800, for the Ile Bédard $200, and for the rights $1700, and naming an arbitrator. The respondents did not accept these offers and named an arbitrator, and a third arbitrator was appointed by a judge of the Superior Court.

The evidence adduced by the appellants before the arbitrators took into account only the agricultural and residential value of the properties, the figures given in respect of them being the amounts offered by the appellants.

The evidence given for the respondents was mainly directed to the value to the appellant company of the lands and rights expropriated and the expenditure which they would save by acquiring them. It treated the three separate properties as a unit essential to the water power development and estimated their value as a part of the company's scheme. It also attributed to the respondents' property the whole value of the water power upon the falls. The character of the evidence of the respondents' witnesses is more fully referred to in the judgment of their Lordships.

On July 4, 1911, the majority of the arbitrators published three awards by which they awarded as compensation $2800 for the Ile aux Vaches, $200 for the Ile Bédard, and $1700 for the rights on the Pointe du Moulin, these amounts being those offered by the appellant company. The respondents appealed, under s. 209 of the Railway Act (R. S. Can., 1906, c. 37), to the Superior Court from the awards in respect of the Ile aux Vaches and of the reserved rights. From the award as to the Ile Bédard there was no right of appeal, the amount being under $600, and the respondents accordingly instituted a suit in that Court to set it aside.

The appeal and suit were heard by Davidson C.J., who, by his judgment delivered on February 19, 1913, allowed the two appeals and reformed the awards, awarding $62,000 in respect of the Ile aux Vaches and $80,000 in respect of the reserved rights, and he also set aside the award in respect of the Ile Bédard and ordered a new arbitration. The learned Chief Justice in arriving at these figures based his judgment upon the evidence above referred to as given on behalf of the respondents.

Special leave to appeal was granted. There was an appeal as of right as to the judgment setting aside the award, but to the Court of review only. There was no appeal as of right against the first two judgments by reason of the operation of the Railway Act of Canada, s. 209, and the Supreme and Exchequer Courts Act, 1886, s. 24, considered in *James Bay Railway Co.* v. *Armstrong.* (1)

(1) [1909] A. C. 624.

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Sir R. Finlay, K.C., Mignault, K.C., and *Geoffrey Lawrence*, for the appellants. The compensation awarded by the learned Chief Justice was based upon wrong principles. In effect the amount was assessed upon the value to the appellant company of the lands and rights expropriated, as component parts of the company's scheme. The judgment assumed that the lands and rights were essential to the company and was based upon this assumption, on the ground that the company had power to expropriate only the lands which it required. That the principle of assessment adopted was wrong appears from the decision in *In re Lucas and Chesterfield Gas and Water Board* (1), and more especially from the judgment of Fletcher Moulton L.J., who enunciates the principles applicable in cases similar to the present. [*Gillespie* v. *Rex* (2) and the Navigable Waters Protection Act, R. S. Can., 1906, c. 115, were referred to.] The evidence upon which the compensation was assessed was also wrong in principle in that it assumed that the owners of an island in a fall of the river control the whole water power of the fall. There was no evidence of competition or imminence of competition for the lands or rights, either for the development of water power or for any other purpose. To warrant an interference with an award of arbitrators which is necessarily rather speculative in amount, a Court should be satisfied, beyond all reasonable doubt, that a wrong principle was acted upon or something overlooked by the arbitrators: *Reg.* v. *Paradis* (3); *Vézina* v. *Reg.* (4); *Lemoine* v. *City of Montreal* (5); and the unreported decision of the Board, April 26, 1894, in *Mussen* v. *Canada Atlantic Ry. Co.* In any case the Court had no power to enter judgment for the amounts awarded, but only to amend the awards.

Sir E. Clarke, K.C., Macmaster, K.C., Sir A. Lacoste, K.C., and *A. Lacoste*, for the respondents. The compensation awarded by the judgments appealed from was not assessed upon any wrong principle. Upon the principles laid down in *In re Lucas and Chesterfield Gas and Water Board* (1) the special adaptability of the property for the development of water power was rightly

(1) [1909] 1 K. B. 16.
(2) (1909) 12 Ex. Ct. (Can.) 406.
(3) (1888) 16 S. C. R. 716.
(4) (1889) 17 S. C. R. 1.
(5) (1894) 23 S. C. R. 390.

taken as an element of value. It is fallacious to say that the compensation given was based on the profit which the company could make from the use of the lands. The arbitrators and, on appeal, the Court were entitled to consider the profit which the owners could make by using their property for producing water power, and in order to ascertain that profit it was legitimate to consider, as a concrete case, the profit which the company would make. The great value of the Ile aux Vaches, whether to the owners or to the company or to any person desiring to develop the water power, was its character as forming a natural dyke at the head of the falls. In any case the award of the arbitrators cannot be supported as it was based entirely upon the agricultural and residential value of the property and altogether excluded its special adaptability for the purpose of developing water power. [*Montreal and St. Lawrence Light and Power Co.* v. *Robert* (1) and the Quebec statute 9 Edw. 7, c. 68, were referred to.] The Superior Court had power under s. 209 of the Railway Act (R. S. Can., 1906, c. 37) to enter judgment for the amounts which it awarded.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The appellants are a company incorporated by a statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges in the Province of Quebec, and to take by way of expropriation lands within the parish actually required for such development.

With a view to such development the appellants served notices of expropriation on the respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number, to wit, (1.) the Ile aux Vaches, (2.) the Ile Bédard, and (3.) reserved rights over the Pointe du Moulin. For these subjects the appellants by the said notices offered to pay respectively $2800, $200, and $1700, and named an arbitrator in the event of these sums not being accepted. The respondents did not accept these sums,

(1) [1906] A. C. 196.

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and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the judge of the Superior Court.

The three arbitrators after visiting the properties heard witnesses and received documents, and finally, by a majority, consisting of the arbitrator appointed by the appellants and the arbitrator appointed by the judge of the Superior Court, awarded as compensation the sums offered by the appellants. The third arbitrator appointed by the respondents dissented and intimated that he would have been prepared to award the sums of $62,000, $34,000, and $80,000 respectively.

Against the findings (1.) and (3.), i.e., for $2800 for the Ile aux Vaches and $1700 for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the respondents. Against finding (2.), owing to the award being less than $600, no appeal lay. But a direct action, in the Superior Court, to set aside the award in toto, was brought by the respondents. The appeals and the direct action were heard together before Chief Justice Davidson of the Superior Court. He allowed the appeals and substituted for the sums awarded the sums proposed to be awarded by the dissenting arbitrator. In the case of the Ile Bédard he set aside the award and directed a new arbitration. From these decisions the present appeal is brought by special leave to this Board.

It now becomes necessary to describe generally the subjects taken. The Ile aux Vaches is an island situated to the north of the medium filum of the St. Lawrence River, at a point about forty miles above Montreal, of the extent of $28\frac{1}{4}$ arpents—an arpent representing slightly more than one acre. Ile Bédard is a smaller island also to the north of the medium filum, having an area of $3\frac{1}{2}$ acres, and situate 7600 feet down the river from the Ile aux Vaches. Further down again, and 700 feet from the Ile Bédard, comes the Pointe du Moulin, which is a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bédard will cut the point in question. The whole of the riverain land at the Pointe du Moulin originally belonged to

the respondents' predecessors. They have sold all the lands at the Pointe du Moulin, subject to a reservation in the following terms :—"Le vendeur, ès qualité, se réserve—1°. Un chemin de vingt quatre pieds de largeur sur toute la profondeur du susdit terrain depuis le chemin de la Reine jusqu'au Fleuve St. Laurent. 2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres bâtisses propres à des fins industrielles. Ces deux réserves sont faites à perpétuité et l'acquéreur, ses hoirs et ayants cause seront obligés de payer toutes taxes municipales ou scolaires qui à l'avenir seront imposées sur les terrains ci-dessus réservés, sans pouvoir prétendre à aucune indemnité ou compensation. Le vendeur ès qualité aura le droit de prendre possession des réserves susmentionnées quand il le jugera à propos, et, de plus, il se réserve tous les débris de l'ancien moulin et le droit de les enlever en aucun temps sans que son passage à cet effet sur la terre susvendue soit considéré comme l'ouverture de l'exercice de la réserve en premier lieu mentionnée d'un chemin, &c., &c., &c. L'acquéreur, ses hoirs et ayants cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la grève du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur ès qualité, en faisant, par les présentes, une réserve expresse."

The river being a navigable river, the bed belongs, according to the law of Canada, to the Crown, and no riparian owner can construct works in the bed without the consent of the Crown.

The river at this place is in rapid. The total fall measured from the top of the Ile aux Vaches down to the lowest point of the Pointe du Moulin is about 28 feet. The scheme of the appellants' works is to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bédard and then on to the lowest point of the Pointe du Moulin. That will impound the whole waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further propose to submerge, by cutting away, all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they propose to erect their power station, thus providing

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for an uninterrupted flow of the river towards their power-house and availing themselves of the total fall of 28 feet.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (1), where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions:—(1.) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2.) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Applying these principles, it is in the opinion of their Lordships impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice is concerned with demonstrating that the arbitrators in the award they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think the learned Chief Justice was right. But when he comes to fix the value to be substituted for that given by the majority of the arbitrators he accepts the figures given by the

(1) [1909] 1 K. B. 16.

dissenting arbitrator and confessedly bases them on the evidence given by the witnesses for the respondents (appellants before him).

Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples :—

Exhibit A10 is a report from Isham Randolph, engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need go no further than the first sentence to see how completely he has misunderstood the legal position : " I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated . . . . the said Ile aux Vaches and the said point of land have very great value, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties to the total head capable of being developed."

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to the Ile aux Vaches, he deals with it thus : First, he says, if the island were not there and there were shoal water, it would cost $39,000 to build a dam, which would represent part of the island. Second, when that was done there would be a loss of 1·7 foot of head, as compared with the present works, which would mean a loss to the company of an annual rent of $1050, which, capitalized at 5 per cent., comes to $21,000. Third, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if

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the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalized, amounts to $17,000; and, fourth, he estimates that the smooth water below it, which the presence of the Ile aux Vaches ensures, amounts to a saving during the construction of the works below it of $6000. Adding these sums together, he puts the value of the Ile aux Vaches at $83,000.

It is difficult to conceive evidence more honeycombed by fallacy than this. Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is ex adverso of it. It measures the value of the island by the cost of an opus manufactum, which might be made if the island was not there; and, lastly, it values both temporarily and permanently the "protective" action of the island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same.

Dealing with the reserved rights at the Pointe, he bases his calculation on loss of profits to the taking company, and also forgets that the power to cut away the protruding parts of the other portions of the Pointe, which alone makes possible the unrestricted flow, is a power that flows from the Government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

Mr. Robertson, another engineer, when asked as to the Ile aux Vaches, gave the following evidence: "Q. You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company?—A. Yes, that in my opinion would be the value to them."

Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a completed whole and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers. Their Lordships may quote the words of Vaughan Williams L.J. in the case cited as applicable to this case: "The element which the arbitrator may take into

consideration is not the fact that the land has in fact been taken, and that the probability (i.e., of purchasers requiring the land for such purposes) has been realized by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before these promoters had obtained their powers. . . . . it appears that the umpire has treated the probability and the realized probability as identical for the purposes of valuation, he has gone on a wrong basis, and we ought to send the award back to him."

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject. Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

It is on account of the latter consideration that their Lordships, while unable to accept the judgment under appeal, are also unable to restore the judgment of the arbitrators. Unfortunately, the appellants led no evidence except as to bare agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value. If the situation be naturally favourable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot after the event be taken into account. Also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be *derived* from the

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reserved water rights, but it is that a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or in other words, that if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme.

As regards the Ile Bédard the Board is, however, satisfied that, on the materials placed before them, the arbitrators' conclusion was reasonable and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will therefore advise His Majesty to direct that with regard to the Ile Bédard the judgment complained of be reversed with costs in the Court below to the appellants the Cedars Rapids Company; and that with regard to the Ile aux Vaches and the reserved power and mill site the judgment complained of be set aside and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth: no costs being allowed to either party in the arbitration already held or in the Court below; and further, that neither party ought to have costs before this Board.

Solicitors for appellants; *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

CHIEF COMMISSIONER OF RAILWAYS AND TRAMWAYS . . . . . } APPELLANT;

AND

HUTCHINSON AND ANOTHER . . . . . RESPONDENTS.

J. C.* 1914 *Jan.* 29; *March* 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Land compulsorily taken for Public Works—Costs of Arbitration—Construction of Statute—Public Works Act, 1912 (*Act* 45 *of* 1912, *New South Wales*), *s.* 118.

Upon the true construction of s. 118 of the Public Works Act, 1912, of New South Wales, where in an arbitration under s. 107 of that Act the sum awarded by the arbitrators is more than that offered by the constructing authority, all the costs of and incidental to the arbitration are to be borne by the constructing authority, even though the sum awarded is more than one-third less than the amount claimed.

APPEAL from an order of the Supreme Court (May 16, 1913) whereby it was ordered that an award of arbitrators should be remitted for amendment in regard to the costs of and incidental to the arbitration.

The Public Works Act, 1912, of New South Wales contains provisions for the compulsory acquisition by a "constructing authority" of land required for "an authorised work" as defined by the Act. "Constructing authority," as defined by s. 3, included the appellant. By s. 39 the Governor may direct that any land required in his opinion for any authorised work may be acquired either by notification in the *Gazette*, or by notice to the parties interested. When the procedure is by notice it is provided by s. 107 that where the claim exceeds 100*l.* the compensation is to be settled by arbitration. The costs of the arbitration are dealt with in s. 118. (1) The appellant gave to

* *Present:* LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

(1) The Public Works Act, 1912 (Act 45 of 1912 of New South Wales), s. 118: "(1.) All the costs of and incident to any such arbitration, as settled by the arbitrators, shall be borne by the constructing

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the respondents notice under the Act in respect of certain lands of which they were the owners in fee simple. The respondents in due course sent in their claim, in which they claimed 47,973*l.* as the compensation payable to them. The appellant thereupon offered to the respondents 22,000*l.* as compensation, and the matter was referred to arbitration under the Act.

On February 28, 1913, the arbitrators made their award, and thereby fixed the compensation at 25,500*l.*, this sum being in excess of that offered by the appellant but more than one-third less than that claimed by the respondents. The arbitrators by their award directed that the respondents should pay the whole of the costs of the arbitration, conceiving that they were bound to do so by s. 118, sub-s. 2.

On March 17, 1913, the respondents issued a summons in chambers of the Supreme Court asking that the award should be remitted with a direction that the arbitrators should have awarded that the costs should be paid by the appellant. The summons was referred to the Court.

On May 16, 1913, the Supreme Court (Cullen C.J. and Sly J., Pring J. dissenting) gave judgment in favour of the applicants, the present respondents, and ordered that the award should be remitted to the arbitrators for amendment, and that the arbitrators should amend the award by directing that the whole of the costs of and incidental to the arbitration and award should be paid by the present appellant.

Upjohn, K.C., and *Austen-Cartmell*, for the appellant. Upon the true construction of s. 118 the appellant is entitled to the costs of and incidental to the arbitration. Sub-s. 2 of that section applies to every case in which the sum awarded is one-

authority, unless the sum awarded by the arbitrators is the same or a less sum than was offered by the constructing authority, in which case each party shall bear his own costs incidental to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

"(2.) If the sum awarded is one-third less than the amount claimed, the whole costs of and incidental to the arbitration and award shall be borne by the claimant, and the arbitrators shall direct the payment of the same accordingly."

third less than the amount claimed. It is to be read as a proviso upon the whole of the directions in sub-s. 1, and not merely as a proviso upon the special direction contained in the latter part of sub-s. 1 in regard to cases in which the sum awarded is the same or a less sum than was offered. Provisions as to arbitration upon the compulsory taking of land for public purposes are contained in the Government Railways Act (22 Vict., No. 19 of New South Wales). In s. 36 of that Act there are provisions corresponding to s. 118 as to costs, but that section is not divided into sub-sections. The Legislature in reproducing these provisions in the Public Works Acts, 1900 and 1912, made the provision now contained in sub-s. 2 of s. 118 a separate sub-section. This shews that the intention of the Legislature was that sub-s. 2 should be effective in the circumstances to which it refers and as a proviso to sub-s. 1 of that section. [*Pacific Co-operative Steam Coal Co.* v. *Railway Commissioners of New South Wales* (1) was referred to.]

Younger, K.C., and *Northcote*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD SUMNER. The State of New South Wales has from time to time made statutory provision for the compulsory acquisition of land for public purposes. The first Act was in 1858, Act 22 Vict., No. 19. There have been various repeals and re-enactments, with and without substantial change, in 1888, 1900, and 1912. The Act now in force is the Public Works Act, 1912, "an Act to consolidate the Acts relating to public works." The provision with which this appeal is concerned has remained without material alteration since 1888, but in that year the corresponding provision of 1858 was altered both in substance and in form.

Litigation in connection with the compulsory acquisition of land may take place before various tribunals. Where land is acquired by notification in the *Gazette*, the claim for compensation, subject to various formalities, goes to a jury, and s. 106, sub-s. 1, regulates the incidence of costs according as the amount of the verdict on the one hand equals or falls short of the amount of

(1) [1904] A. C. 795.

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the valuation notified to the claimant, or on the other exceeds it. When land is acquired by notice to the parties, the question of compensation goes to arbitrators or to justices according as the amount claimed does or does not exceed 100*l*. Justices have the costs in their discretion and settle the amount of them, doubtless because it is expected that proceedings before them will be inexpensive and simple and the costs small. When arbitrators deal with the claim, costs are regulated by s. 118, the section in question in this appeal. Furthermore, when arbitrators award 300*l*. or more, either party, if dissatisfied, can have the question of compensation resettled by a jury on certain conditions. In that case s. 123 adjusts the costs according as the verdict is for the same sum as was awarded by the arbitrators, or for a less sum, or for a sum greater than that previously offered by the acquiring authority and awarded by the arbitrators.

The Legislature has neither uniformly left the costs to the discretion of the tribunal nor uniformly regulated them on any one statutory principle. The plan pursued has been to fix in each case a rule as to costs according to the procedure adopted, except when the matter is expressly left to the tribunal's discretion. The rule in each case decides the incidence of costs by simple reference to certain ascertainable amounts. It is not rested on considerations arising on the particular case. The plan is to ensure certainty, so as to enable parties to count the cost before they go to law. No doubt in the vast majority of cases these provisions achieve their object without difficulty or discussion.

In the present case the claim for compensation came before arbitrators and was not thereafter taken before a jury. The sum awarded to the claimants, the now respondents, fell short of the claim lodged by upwards of one-third of it, but exceeded the valuation and offer of the constructing authority by a substantial sum. Sect. 118, sub-s. 2, enacts that, if the sum awarded is one-third less than the amount claimed, the whole costs of and incidental to the arbitration and award shall be borne by the claimant, and the arbitrators shall direct payment of the same accordingly. The arbitrators did so direct payment, holding that s. 118,

sub-s. 2, applied. The claimants appealed to the Supreme Court. Sect. 118, sub-s. 1, enacts that "all the costs of and incident to any such arbitration, as settled by the arbitrators, shall be borne by the constructing authority, unless the sum awarded by the arbitrators is the same or a less sum than was offered by the constructing authority, in which case each party shall bear his own costs incidental to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The Supreme Court held that s. 118, sub-s. 1, applied, and reversed the decision of the arbitrators as to costs. The constructing authority, the Chief Commissioner for Railways and Tramways, now appeals and contends that the arbitrators were right.

Obviously, the Legislature of New South Wales did not intend to make contradictory provisions in two consecutive sub-sections of the Act. The whole question is what is their effect when read together? The appellant contends that the second prevails, reading sub-s. 2 as a proviso upon or an exception out of sub-s. 1 as a whole. The respondents, relying on the reasoning of the majority of the judges in the Supreme Court, contend that the right construction is to treat sub-s. 2 as a further limitation on the words in sub-s. 1 which commence with "unless the sum awarded . . . ." and to hold that they are in their nature a proviso.

Their Lordships are of opinion that the reasoning of the majority of the judges in the Supreme Court is correct. The scheme of the section is to place the liability for costs normally on the constructing authority, with an exception which leaves each party to bear his own costs in a particular case, and with a further proviso (designed no doubt to discourage excessive claims) that if the sum awarded is one-third less than the amount claimed, then, so far from the claimant having his costs paid or escaping without paying those of his opponent, he shall in this event pay the costs of both sides. The reasonable construction is that if the claimant justifies his position by recovering more than was offered to him, he gets his costs under the ordinary rule; but if he loses his costs because he ought to have accepted the offer instead of going to arbitration, and has further been guilty of making an excessive claim, there is added to the loss of his own

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costs, with which the first mistake is visited, the liability to pay the costs of the other side as a penalty for his greed. In the words of Cullen C.J., "sub-s. 2 should be read . . . . as a proviso only upon the special direction contained in the latter part of sub-s. 1, taking out of the rule there laid down those cases in which the sum recovered is at once one-third less than the claim and less than or no more than the sum offered."

The appellant relied in argument upon the corresponding provision, s. 36 in the Act of 1858, which differed from that now in force not only in taking one-fourth as the margin but also in the structure of the enactment, which had no numbered sub-sections but ran on in one sentence, prefacing with a "but" the words "if the sum awarded shall be one-fourth less than the amount claimed . . . ." It was said that this was ambiguous, and that the present provision, which is broken up into several sentences and sub-sections, was intended to avoid this ambiguity. Their Lordships see no ambiguity in the former provision, and think that, so far from assisting the argument, the repealed section tends to defeat it by shewing that the intention of the Legislature has throughout been to limit the case, where an award does not exceed an offer, by a further and special provision for a case where not only does the award not exceed the offer but the claim exceeds the award by more than the margin allowed.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondents' costs of the appeal.

Solicitors for appellant: *Light & Fulton.*

Solicitors for respondents: *Sutton, Ommaney & Rendall.*

[PRIVY COUNCIL.]

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES . . . . . APPELLANT;

AND

REED . . . . . RESPONDENT.

J. C.* 1914 *Feb.* 3, 5; *March* 19.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Insurance (Life)—Law of New Zealand—Waiver of Statutory Provisions—Public Policy—Surrender Value—Construction of Policy—Life Insurance Act, 1908 (*No.* 105 *of* 1908), *s.* 64.

Sect. 64 of the Life Insurance Act, 1908, of New Zealand provides that: "No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto." A policy issued by the appellant society contained a condition that it should lapse upon non-payment of any premium when due except that, if premiums had been paid for at least three years, there should be automatically granted a paid-up endowment for the amount fixed by a table appended to the policy, or in lieu thereof, at the option of the assured, (1.) the cash value fixed by the table would be paid, or (2.) a paid-up policy granted; by the condition it was further agreed that all right or claim for non-forfeiture or for surrender value other than that provided was waived. In answer to question 10 of Sched. VII. the appellant society stated that it had not agreed to give a cash surrender value, but offered paid-up policies:—

Held, that s. 64 was intended to lay down a rule of public policy and that it was not competent for an assurer or an assured to contract himself out of or to waive its provisions, but that the section did not apply to the policy in question, since the policy did not provide for the payment of any cash surrender value.

APPEAL from a judgment of the Court of Appeal of New Zealand (October 9, 1912) on an originating summons under the Declaratory Judgments Act, 1908.

The appellant society was an insurance company incorporated in the United States and carrying on business in the United States, Australia, New Zealand, and elsewhere.

In March, 1902, the respondent effected an insurance on her life with the appellant on the terms of a policy issued by the

* *Present:* LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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appellant and known as the "New Guaranteed Cash Value Policy" for 1000*l.* in consideration of a half-yearly premium of 20*l.* 12*s.* 6*d.* payable for twenty-five years.

By the policy, which was dated July 7, 1902, the appellant agreed to pay on the death of the respondent 1000*l.*, or if she should be living and the policy in force on March 26, 1927, to pay to her 1000*l.* The policy provided that certain privileges and conditions appended to the policy were to form part of the contract.

Condition IV. provided that if default should be made in payment of the premiums the appellant would waive the default and accept a payment tendered within thirty days.

Condition V. provided that should the policy lapse it might be reinstated at any time upon the respondent furnishing satisfactory evidence of good health and paying the arrears with 5 per cent. interest.

Condition VII., which is set out in full in the judgment of their Lordships, provided that the policy should lapse and the premiums be forfeited on non-payment of any premium, except that after payment of premiums for at least three years there should automatically be granted a paid-up endowment policy for the amount appearing in a table appended; or in lieu thereof, at the option of the assured, (1.) the cash value appearing in the table would be paid to the assured upon surrender of the policy, or (2.) (provided the policy were surrendered within the days of grace, or with satisfactory evidence of good health within one year after) a paid-up term policy for the full amount assured under the policy, and if the assured were living at the expiration of the said term policy the full endowment indicated in the table would be paid in cash.

Condition VII. concluded: "in consideration of the premises it is agreed that all right or claim for non-forfeiture or surrender value other than that provided in this contract is hereby waived and relinquished, whether required by the statutes of any country or State or not."

At the date of the policy the statutes relating to life assurance in New Zealand were contained in the following Acts:—The Life Assurance Companies Act, 1873 (No. 18 of 1873), the Life

Assurance Policies Act, 1884 (No. 31 of 1884), and an amending Act, No. 20 of 1885. These Acts (together with an amending Act of 1903) were consolidated by the Life Assurance Act, 1908 (No. 105 of 1908) (1), hereinafter referred to as the Act of 1908.

The appellant society in its reply to question 10 in Sched. VII., referred to in s. 64, stated that the society had not agreed to give cash surrender value, but that it agreed in most of its policies to give paid-up policies, if applied for within a reasonable time after lapse, provided that three annual premiums had been paid.

The respondent duly paid the premiums due under the policy down to and including that due on September 6, 1906, but paid no premium subsequently thereto. By a letter dated July 23, 1909,

(1) The Life Assurance Act, 1908 (No. 105 of 1908), provides :—

Sect. 19, sub-s. 1 : "Every company shall, within nine months after the date of each such investigation as aforesaid into its financial condition, prepare a statement of its life insurance and annuity business in the form contained in the Seventh Schedule hereto."

Sect. 41 : . . . . "'Policy' means any contract, so long as such contract remains in force, heretofore or hereafter lawfully entered into by a company, the terms of which are dependent upon the contingencies of human life."

Sect. 63 : "A company may, subject to any by-laws or regulations made by it or affecting it, and subject also to the terms and conditions of the policy, apply the surrender value of any policy or any part of such surrender value in payment of overdue premiums and interest thereon ; and any moneys so applied, with accrued interest thereon, shall be a first charge on the money payable under such policy and on the surrender value thereof, and may be deducted therefrom as against any mortgagee or assignee whomsoever."

Sect. 64 : "No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company to the tenth question of the Seventh Schedule hereto."

Sects. 64 to 66 inclusive are headed "Protection of Policies."

The tenth question of the Seventh Schedule to the Act is as follows :—

"10. A table of minimum values (if any) allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of its application to policies of different standing and taken out at various interval ages, from the youngest to the oldest."

Sects. 41, 63, and 64 above correspond respectively to ss. 2, 31, and 32 of Act No. 31 of 1884. Sect. 19 and Sched. VII. are taken from Act 18 of 1873.

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in reply to a letter from the respondent, the appellant informed her that the society, pursuant to the provisions of the Act of 1908, had been maintaining the policy out of the surrender value and that the net amount payable upon surrender was then 45*l.* 11*s.*, and suggested an alternative method for dealing with the policy. In December, 1910, the respondent claimed the grant of a paid-up policy for 200*l.*

On June 27, 1912, the respondent issued an originating summons against the appellant, under the Declaratory Judgments Act, 1908.

The questions which the summons asked the Court to determine were as follows:—

(1.) Whether under the terms and conditions of the new guaranteed cash value policy (the form of which was set out in the schedule to an accompanying statement) the defendant society is required by the law of New Zealand to continue such policy in force after the insured has ceased to pay premiums by applying the surrender value for that purpose so long as any such surrender value continues to exist, unless the insured expressly notifies to the defendant society the election of the insured to cease payment of premium and requires the society to issue a paid-up policy in exchange for the original policy.

(2.) Whether the plaintiff was, under the circumstances set out in the statement, entitled ipso facto, and without any notification on her part to the defendant society on her ceasing to pay premiums, to the automatic issue to her of a paid-up endowment policy for the appropriate amount according to the third column of the table to condition VII. of the said new guaranteed cash value policy under the heading "paid up endowment granted automatically unless other settlement selected."

(3.) Whether the defendant society under the law of New Zealand remained liable in the event of the death of the plaintiff so long as any surrender value existed to pay to the representatives of the plaintiff the full amount of the original policy, less only the sums applied in payment of premium and interest thereon.

(4.) Whether the plaintiff by accepting the policy issued waived the benefit of the special statutory provisions for the

benefit of policy-holders requiring life insurance companies to apply the surrender value in keeping the policy on foot.

(5.) Whether such waiver (if any) was effectual to discharge the defendant society from its liability (if any) under the law of New Zealand to apply surrender value to keep the policy on foot.

By an order of the Supreme Court of June 27, 1912, the summons was by consent removed into the Court of Appeal.

On October 9, 1912, that Court (Stout C.J., Williams, Denniston, Edwards, and Cooper JJ.) delivered judgment (Edwards J. dissenting) answering the above questions as follows: (1.) No. (2.) Yes. (3.) No. (4.) Yes. (5.) Yes. Stout C.J. in the course of his judgment said that it was not denied that a policy might be good which had no provision for a surrender value, and that, in his opinion, s. 63 contemplated that there might be a policy which did not permit an insurer to apply the surrender value to the payment of premiums. After considering the terms of condition VII. of the policy the learned Chief Justice came to the conclusion that its terms did not violate s. 64. Williams, Denniston, and Cooper JJ. delivered judgments substantially to the same effect. Edwards J., in dissenting, expressed the view that the provisions of s. 64 could not be waived and that the effect of ss. 63 and 64 was to invalidate condition VII. of the policy as a contract binding the respondent to take an endowment policy in satisfaction of her claim to the surrender value of the policy, but that it left the condition binding as an offer by the society which the assured could elect to accept.

P. O. Lawrence, K.C., and *Northcote*, for the appellant. The provisions of the Act of 1908 shew that it was the intention of the Legislature that s. 64 should not be capable of being waived by any condition in a policy. That section forms one of a group of sections under the heading "Protection of Policies" and was enacted to protect policy-holders against the assurer and to prevent the latter from treating a policy as lapsed so long as its surrender value was not absorbed by premiums in arrear and the interest thereon. The section is based upon principles of public policy, and its provisions cannot be waived by agreement between the assured and the assurer. Condition VII. of the

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policy infringes s. 64 and is invalid. The majority in the Court of Appeal was wrong in holding that because the Act does not prohibit policies with no surrender value, or the surrender of policies while possessing a surrender value, therefore s. 64 has no application to a policy in which an option is given to the assured as to the mode in which the surrender value may be applied in the case of default. Sect. 63 belongs to a different group of sections to s. 64 and does not control its effect. Though s. 64 leaves the assured free to surrender the policy either for cash or for some equivalent benefit, it prohibits the assurer, in the absence of a surrender, from forfeiting the policy or substituting a new policy for it so long as any surrender value exists. The High Court of Australia in *Equitable Life Assurance Society of the United States* v. *Bogie* (1) held that a similar provision of the law of Queensland could not be waived by the parties.

W. F. Hamilton, K.C., and *H. S. Preston*, for the respondent. The Act of 1908, upon its true construction, does not invalidate an agreement between the assurer and the assured that the surrender value may be satisfied by the grant of a fully-paid endowment policy. In s. 64 the words "surrender value" mean the cash surrender value agreed to be paid by the assurer, and in the present case there was no such surrender value. The effect of what occurred was not that the policy became void, but that there arose, ipso facto under its terms, an obligation to grant the fully-paid endowment provided in the table, unless the respondent exercised either of the options. The cash payment provided for at the option of the assured is to discharge the liability automatically arising to grant an endowment policy, and is not in consideration of the surrender of the liability to pay the sum insured; it is consequently not the surrender value referred to in s. 64. The case decided by the High Court of Australia is distinguishable since the policy there under consideration was different in its terms. If, however, the terms of the present policy are contrary to s. 64, the provisions of that section were waived by the agreement contained at the end of condition VII. Where a right or privilege exists solely in favour of a class, it can be waived by a member of the class provided he can do so

(1) (1905) 3 C. L. R. 878.

without prejudice to the other members of it: *Rumsey* v. *North Eastern Ry. Co.* (1); Maxwell on the Interpretation of Statutes, 5th ed. (1912), p. 625.

P. O. Lawrence, K.C., in reply. In the events which happened the policy became void under condition VII. The rights of the assured under the endowment policy cannot be regarded as being rights under the original policy. This appears from the definition of "policy" in s. 41 of the Act.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The only question argued in this appeal was the effect of the 63rd and 64th sections of the Life Insurance Act, 1908, of New Zealand on the policy issued by the appellants to the respondent. Any argument, if such existed, based upon the conduct of the parties was waived.

The policy in question was what is generally known as an endowment policy. In return for the payment of 20*l.* 12*s.* 6*d.* as a premium paid each half-year for twenty-five years, the appellant agreed to pay to the respondent's executors the sum of 1000*l.* if death should take place before the expiration of the twenty-five years, and the like sum of 1000*l.* to the respondent herself if she should survive that period. It is specially set out that the privileges and conditions set out in the third and fourth pages of the instrument shall form part of the contract.

The question arises on the seventh privilege or condition. It is headed "Loans and Surrender Values," and it is in the following terms:—

"VII. LOANS AND SURRENDER VALUES.

"After this policy has been in force three years the society will make loans thereon at five per cent. interest per annum, payable in advance, of the respective amounts stated in the following table, upon the due assignment of this policy to the society as collateral security for such loan.

"This policy shall lapse and together with all premiums paid thereon shall forfeit to the society on the non-payment of any premium when due, except that provided premiums shall have been paid for one of the periods respectively mentioned in the

(1) (1863) 14 C. B. (N.S.) 641, at p. 653.

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following table, there will be granted, without action on the part of the assured, a paid-up endowment for the amount fixed in the said table; or in lieu thereof, at the option of the assured, (1.) the cash value fixed in the said table will be paid to said assured upon the due surrender of this policy to the society at any time after its termination; or (2.) (provided this policy is surrendered within the days of grace, or, with satisfactory evidence of good health, within one year thereafter) a paid-up term policy for the full amount assured under this policy, and if the assured is living at the expiration of said term policy, the pure endowment indicated in the table will be paid in cash to the said assured. The paid-up assurance, cash value and paid-up term policy referred to herein, are based on the number of full year's premiums that have been paid, are granted without participation in profits, and are subject to reduction for any indebtedness to the society under this contract. In consideration of the premises it is understood and agreed that all right or claim for non-forfeiture or surrender value other than that provided in this contract is hereby waived and relinquished, whether required by the statutes of any country or State or not."

Then there is added a table of loans and surrender values as follows:—

TABLE OF LOANS, AND OF SURRENDER VALUES.

Either in Cash, Paid-up Endowment, or Extended Assurance, in accordance with the Provisions of Section VII. above.

At the end of	Loan or Cash Values.	Paid-up Endowment, granted automatically, unless other Settlement selected.	Extended Term Assurance for Face of Policy, from Date of Non-payment of Premium.	
			Assurance extended for	Cash (Pure Endowment) payable to Assured, if living, at Expiration of Extended Assurance.
Years.	£ s. d.	£ s. d.	Years. Months.	£ s. d.
3	47 0 0	120 0 0	7 7	—
4	74 0 0	160 0 0	12 2	—
5	107 0 0	200 0 0	16 8	—
6	131 0 0	240 0 0	19 0	24 0 0
*	*	*	*	*
20	719 0 0	800 0 0	5 0	787 0 0

The respondent paid the stipulated premiums for five years and then ceased to pay. She claims that, in terms of the contract made, she is entitled to a paid-up endowment of 200*l.* The appellants do not dispute that this is in accordance with the terms of the contract, but say that, their attention having been called to s. 64 of the Act of 1908, they could not fulfil their promise, but were bound to consider the policy as still existing in the form of an endowment policy of 1000*l.*, until the cash value of 107*l.* was eaten up in accordance with s. 63 by the premiums necessarily becoming due, and remaining unpaid, after which no further obligation remained on their part.

An originating summons was taken out by the respondent under the Declaratory Judgments Act, 1908, wherein five questions were put to the Court. Their Lordships will advert to the answers later. For the present it is enough to say that the Court of Appeal, by a majority of four to one, upheld the contention of the respondent, and found her entitled to a paid-up endowment of 200*l.*

The question turns on the meaning and effect of s. 64 of the Insurance Act of 1908. That section is as follows: "No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto."

Sect. 64 is the first of a fasciculus of sections headed "Protection of Policies." The other sections which end with s. 66 are concerned with the protection of policies from the effects of bankruptcy and the securing that the proceeds of a policy at death shall pass to the representatives of the deceased.

Their Lordships have no doubt that this is a section intended to lay down a rule of public policy, and that it is impossible for either an assured or an assurer to contract himself out of it or to waive its effect. They cannot, therefore, agree with the answers given by the majority of the Court to the questions 4 and 5 as put.

Taking, then, the section as an injunction which cannot be disregarded, what is its meaning? In all cases where something

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not ipsa natura unlawful is prohibited by statute, the words of prohibition must be taken as they stand; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom. In other words, the evil that was to be checked can only be considered so far as necessary for the interpretation of the words, but must not be used for an independent determination of the scope of the remedy.

Now it will be observed, first, that the section is in a negative form—it prohibits, it does not enjoin. And it cannot, in their Lordships' opinion, be turned into a mandatory section by combining it with the provisions of s. 63, as is done in part of the argument used by Edwards J. in the Court below.

Secondly, the only thing struck at is the becoming void of a policy in respect of the non-payment of a premium. This prohibition is universal, i.e., it is equally directed against a special stipulation to that effect and against the common law result in mutual contracts falling within the section when one party fails to perform his part of the bargain or when the liability of one party is expressed to be conditional on the other party performing his part of the bargain. What, then, is the meaning of the term "void"? The word is used in a business sense common in speaking of insurances and not with any legal technicality in the sense of avoidance ab initio. The meaning here is that the assurer is not to be relieved from his liabilities under the policy by reason of non-payment of premiums. Any clause in a policy which would have this result would be struck at and made non-effective by the statute. It is, however, next to be observed that the prohibition is not absolute, but is conditioned by the words "so long as the premiums and interest thereon in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto." This refers us to the Seventh Schedule to find out in each case what is the surrender value spoken of in s. 64.

The Seventh Schedule is a schedule which, in terms of s. 19 of the Act, an insurance company is bound to fill up every five or ten years, as the case may be, and the scope of it is a general statement of the life insurance and annuity business of the

company. Various particulars are required, which it is not necessary to quote, and then comes the tenth question, which is as follows: "A table of minimum values (if any) allowed for the surrender of policies for the whole term of life, and for endowments and endowment assurances, or a statement of the method pursued in regulating such surrender values, with instances of its application to policies of different standing and taken out at various interval ages, from the youngest to the oldest."

It is obvious that the answer to this question made every five or ten years, as the case may be, must be of a general description, but their Lordships do not doubt that the answer, though made in general terms, may be of such a character as to make it right to refer to the particular policy de quo queritur in order to see the surrender value under it. As to the meaning of the actual expression "surrender value" there can be no doubt. Surrender value in general means that value or consideration which a company has contracted or is prepared to pay at any particular time during the currency of the contract in consideration of being relieved as from that time of the liability dependent on the continuance of premiums paid. Their Lordships are of opinion that the surrender value referred to in the tenth question is the surrender value, if any, which the company has contracted to pay. Looking, however, to the terms of s. 64 the surrender value there referred to must necessarily be a cash value, for no other consideration could be compared in terms of money with the amount due in respect of the overdue premiums.

Turning now to the facts of the present case. The society's answer to question 10 in the schedule is set out in the judgment of Stout C.J. and need not here be quoted at length. It explains that in respect of Australian policies, with the exception of guaranteed cash value policies, "the society has not agreed to give cash surrender values, but it agrees in most of its policies . . . . to give paid-up policies if applied for within a reasonable period after the lapse, provided three annual premiums have been paid." It then goes on to explain the method of calculation as to amount.

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The policy itself, as will be observed from the terms of condition VII., already quoted, does not exactly follow this description; because the paid-up endowment which becomes due on the failure to pay after three years' premiums have been paid is granted automatically and without special application.

Applying what has been said to the above conditions, their Lordships are of opinion that s. 64 has no application to the present case, because the society does not by the policy contract to pay any cash surrender value. The thing which the society covenants to give is not cash, nor is it to be given in consideration of the assured relieving the society from any liability under the policy: it is a fully-paid endowment to be given if and when the society's obligation to pay 1000*l.* under the policy has come to an end by reason of the non-payment of premiums. What is called the loan or cash value in the column with that heading is not a payment which the society makes to buy off the liability dependent on the continuance of premiums paid, that is already gone, but a payment to get off the liability under the paid-up endowment.

Their Lordships are therefore of opinion that the conclusion of the majority of the Court was correct. In the argument their Lordships' attention was called to the case of *Equitable Life Assurance Society of the United States* v. *Bogie* (1), decided in the High Court of Australia. There were special circumstances in that case which were sufficient to dispose of it. As regards the general dicta it is enough to say that the policy in that case was essentially different from the present inasmuch as if the assured failed to apply he might have lost everything, and that in the absence of argument their Lordships do not think it expedient to express any opinion as to what the result in that case would have been if the specialities had been non-existent and it had been necessary to consider that policy in the light of the general remarks which their Lordships have made in this case.

In their Lordships' opinion the proper course will be to declare that the policy in question had no surrender value within the 64th section of the Act, but that the provisions of that section are not capable of being waived by antecedent contract between

(1) 3 C. L. R. 878.

the parties, and with this declaration to discharge the order appealed from so far as it answers the third, fourth, and fifth questions in the summons. Subject to this their Lordships will humbly advise His Majesty that the appeal should be dismissed, the appellant to pay the respondent the costs of the appeal.

Solicitors for appellant: *Burn & Berridge.*
Solicitors for respondent: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

IBRAHIM . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Criminal Law—Jurisdiction in China—Afghan enlisted in Indian Regiment—British Subject—China and Corea Order in Council, 1904—*Foreign Jurisdiction Act*, 1890 (53 & 54 *Vict. c.* 37), *ss.* 1, 4, 6, 9.

The appellant, who was a subject of the Ameer of Afghanistan, was enrolled as a private in the 126th Baluchistan Infantry and made an affirmation of allegiance. On September 4, 1912, while he was serving with a detachment of that regiment on Shameen Island at Canton, a native officer of the regiment was murdered; the appellant was taken into custody on the spot and charged with the murder. Under a warrant issued by a judge of His Majesty's Supreme Court for China, he was removed to Hong Kong, where he was tried by the Supreme Court of that Colony and a jury, and upon conviction was sentenced to death. The jurisdiction of the Supreme Court of China and Corea includes criminal jurisdiction and is conferred by the Foreign Jurisdiction Act, 1890, and the China and Corea Order in Council, 1904. Art. V. of that Order provides as follows: "the jurisdiction conferred by this Order extends to the persons and matters following, in so far as by treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say: (1.) British subjects, as herein defined, within the limits of this Order; . . . . (3.) foreigners, in the cases and according to the conditions specified in this Order and not otherwise; (4.) foreigners, with respect to whom any State, King, chief or government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to

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* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD SUMNER.

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the exercise of power or authority by His Majesty." Art. III. provides that "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act or otherwise, enjoys His Majesty's protection in China or Corea." Art. L. provides that "where a British subject is accused of an offence the cognizance of which appertains to any Court established under this Order, ... he may be sent for trial to Hong Kong or to Burma."

At the trial uncontradicted evidence was given that the jurisdiction exercised at Canton on Shameen was the same exterritorial jurisdiction as is exercised throughout China and Corea under the Order in Council, that soldiers in Indian regiments enjoy the protection of His Majesty on Shameen, and that the Court exercises jurisdiction over them. The evidence of the officer in command of the detachment was admitted that ten or fifteen minutes after the murder he said to the appellant, who was then in custody, "Why have you done such a senseless act?" to which the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him." There was a body of other evidence which clearly established the guilt of the appellant, and rendered it very improbable that a jury would have acquitted him if his confession had been excluded:—

Held, (1.) that the evidence established that "by usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton, and that the appellant was a British subject within art. III. of the Order; (2.) that the jurisdiction was not prevented from extending to the appellant as a British subject within art. III. by the words "and not otherwise" in art. V. (3.); (3.) that the Court was not precluded from hearing the evidence which established its jurisdiction by reason of the Foreign Jurisdiction Act, 1890, s. 4, which provides for the decision of a Secretary of State upon the application of the Court; (4.) that the appellant's confession was a voluntary statement in the sense that it was not made either from fear of prejudice or hope of advantage, and that, even if it was inadmissible in evidence upon the ground that it was made by him in answer to his officer in whose custody he was (as to which the law was not settled), its admission, having regard to the other evidence given and to the circumstances of the case, was not such a violation of the principles of natural justice as entitled the appellant, according to the practice of the Board, to have his conviction set aside.

The authorities as to the admission in evidence of a statement made by a prisoner in reply to a person in whose custody he is reviewed.

Makin v. *Attorney-General for New South Wales* [1894] A. C. 57 explained.

APPEAL, in forma pauperis by special leave, from a judgment of the Supreme Court of Hong Kong (December 16, 1912) affirming a conviction of the appellant for wilful murder and sentence of death pronounced by the Chief Justice.

The appellant, a natural-born subject of the Ameer of Afghanistan, was enrolled in 1911 as a private in the 126th Baluchistan Infantry, a regiment of His Majesty's Indian forces. After his enrolment the appellant made an affirmation of allegiance to His Majesty and that he would faithfully serve in those forces. On September 4, 1911, he was serving with a detachment of his regiment on Shameen Island at Canton, when Ali Shafa, a subadar or company commander in the regiment, was murdered by being shot with a rifle. The appellant was arrested on the spot and charged with the murder.

A preliminary inquiry took place before the judge of the Provincial Court at Canton, and on September 18, 1912, a judge of the Supreme Court for China and Corea issued a warrant for the removal of the appellant to Hong Kong for trial by the Supreme Court of that Colony. The jurisdiction of the Supreme Court for China and Corea is conferred by the China and Corea Order in Council, 1904, made under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 9. The extent and nature of the jurisdiction appear from arts. III. and V. set out in the head-note. The appellant was sent for trial to Hong Kong under art. L., and the jurisdiction of the Provincial Court at Canton rests upon art. XIX. of the Order.

An indictment was preferred against the appellant by the Attorney-General of Hong Kong charging him with the murder, and he was tried before the Chief Justice and a jury on October 21, 22, 23, and 24, 1912, but the jury failed to agree and was discharged. The appellant was tried a second time before the Chief Justice and a jury on November 18, 19, 20, 21, and 22, 1912, and the jury returned a unanimous verdict of guilty. Sentence was postponed pending the hearing by the Full Court of the Supreme Court of points as to the jurisdiction of the Court raised at the trial. On November 25, 1912, these points were argued before the Full Court (Rees Davies C.J. and Gompertz J.) and judgment was delivered affirming the conviction.

On December 16, 1912, the Full Court dismissed an application for a rule nisi for a habeas corpus and a motion to arrest judgment, and the Chief Justice sentenced the appellant to death.

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The sentence was respited, in the event of leave to appeal being granted, until His Majesty's pleasure should be known. Special leave to appeal in forma pauperis was granted by the Board.

At the trial the Order in Council was put in evidence and the warrant proved; the British Vice-Consul at Canton gave evidence that the place of the murder was within his jurisdiction as judge of the Provincial Court established at Canton under the Order in Council; that the jurisdiction exercised at Canton on Shameen is the same exterritorial jurisdiction as is exercised throughout China by the Supreme Court; that soldiers in Indian regiments enjoy His Majesty's protection in Shameen, and that the Court exercises jurisdiction over them. This evidence was not modified upon cross-examination or contradicted.

The evidence of Major Barrett, the commanding officer of the detachment on Shameen, was admitted at the trial to the effect that within ten or fifteen minutes of the murder, the appellant being then in custody of the guard, he said to the appellant, "Why have you done such a senseless act?" to which the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him."

There was, in addition, a body of evidence, referred to in their Lordships' judgment, as to the circumstances of the murder which clearly established the guilt of the appellant.

Romer Macklin, for the appellant. There was no evidence given at the trial of any "treaty, grant, usage, sufferance or any other lawful means," which could establish the jurisdiction of the Supreme Court of China and Corea under art. V of the Order in Council: *Imperial Japanese Government* v. *Peninsular and Oriental Steam Navigation Co.* (1) The evidence given by the Vice-Consul did not prove that the jurisdiction was exercised by sufferance, it amounted only to an expression of opinion that jurisdiction existed. Further, the jurisdiction having been questioned at the trial, its existence could not be validly proved by the admission of evidence, but only in the manner provided by s. 4 of the Foreign Jurisdiction Act, 1890, namely, by application to a Secretary of State. The appellant is a foreigner

(1) [1895] A. C. 644.

and a subject of the Ameer of Afghanistan. There was no evidence of any agreement with the Ameer, by treaty or otherwise, which would bring the appellant within the category of foreigners to whom the jurisdiction extends under art. V. (4.). The appellant was not a British subject within the definition contained in art. III., but even if he came within the terms of that definition as a person enjoying His Majesty's protection in China, the jurisdiction under the Order in Council did not extend to him, since he was a foreigner, and under art. V. (3.) the jurisdiction extends to foreigners in the cases and according to the conditions specified in the Order "and not otherwise." The Supreme Court held that under the Army Act, 1881 (44 & 45 Vict. c. 58), and the Indian Army Act (Act VIII. of 1911) the appellant was a British subject within the Order. This view is erroneous, since s. 95 of the Army Act, which permits the enlistment of "a person of colour, although an alien," is excluded from application to the Indian forces by s. 180, sub-s. 2 (*h*), of the Army Act, and there is no express provision in the Indian Army Act for the enlistment of aliens. [Army Act, 1881, s. 180, sub-s. 2 (*a*) and (*b*), s. 190, sub-ss. 8 and 22; Indian Army Act, s. 2, sub-ss. 1 and 2; Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), ss. 1, 6, 9, and 11; and *Macleod* v. *Attorney-General of New South Wales* (1) were also referred to.] The evidence with regard to the statement made by the appellant to his officer was wrongly admitted at the trial, since he was in custody at the time and the officer was a person in authority whom he was bound to answer. The Full Court in *Rex* v. *Wong Chiu Kwai* (2) laid down that a statement under these circumstances was inadmissible, and that decision is in accordance with the English authorities. That evidence was of the greatest materiality, and in consequence of its admission the appellant is entitled to have the conviction set aside: *Makin* v. *Attorney-General for New South Wales* (3); Archbold's Criminal Pleading, 1910 ed., p. 190.

Sir R. Finlay, K.C., and *E. W. Hansell*, for the respondent, were not called upon.

(1) [1891] A. C. 455.
(2) (1908) 3 Hong Kong L. R. 89.
(3) [1894] A. C. 57.

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The judgment of their Lordships was delivered by

LORD SUMNER. The appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on January 12, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea. On September 4, 1912, he was a private serving with the detachment of that regiment which was encamped on Sha-mien or Shameen Island at Canton as guard of the Concession. On Shameen are situated the various European settlements including the British. About 10.30 P.M. Subadar Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal, which was brought by special leave in forma pauperis. His grounds are two: first, that the jurisdiction of the Court was not established, and, second, that there was a grave miscarriage of justice by reason of the misreception of evidence.

The jurisdiction of the Supreme Court of China and Corea is conferred by the Foreign Jurisdiction Act, 1890, and by the China and Corea Order in Council, 1904, and includes criminal jurisdiction. Art. V. provides that "the jurisdiction conferred by this Order extends to the persons and matters following, in so far as by treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say: (1.) British subjects, as herein defined, within the limits of this Order . . . .; (3.) foreigners, in the cases and according to the conditions specified in this Order and not otherwise; (4.) foreigners, with respect to whom any State, King, chief or government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty."

By art. VI. it is provided that "all His Majesty's jurisdiction, exercisable in China or Corea for the hearing or determination of criminal or civil matters, ... shall be exercised under and

according to the provisions of this Order in Council and not otherwise."

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exercisable in accordance with the Order in Council, was not shewn to extend, and therefore for the purposes of this case did not extend, to Ibrahim, who is admittedly an Afghan and a subject of the Ameer. Art. III. of the Order defines a "British subject" thus: "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, enjoys His Majesty's protection in China or Corea."

There was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects; but it may be reasonably inferred from the practice of enlisting native Afghans in Indian native regiments, whereby they are de facto brought under the authority of His Majesty, a practice which is matter of public knowledge, that the Ameer does in fact consent to such enlistment with its consequences. Whether or not this suffices to bring such enlisted Afghans within the terms of art. V. (4.) of the Order in Council, "foreigners, with respect to whom any State, King, chief or government whose subjects . . . . they are . . . . consents to the exercise of power or authority by His Majesty,' it is not necessary for their Lordships now to determine.

The British Vice-Consul at Canton, who in September, 1912, was also Acting Consul, is judge of a Provincial Court, held at Canton under art. XIX. of the Order, which is a Court of record, and by art. XXII. exercises "all His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court." He was called as a witness at Ibrahim's trial and deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same exterritorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over

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them"; and that "consular protection extends to trying persons and protecting them if they are improperly arrested." This evidence was not modified under cross-examination or contradicted in any way by evidence for the defence. The witness went on to say that he conducted the preliminary examination in this case and considered it expedient that the case should be sent for trial to Hong Kong (an opinion in which Major Barrett, commanding the detachment, concurred), thus satisfying the provisions of art. L. of the Order with regard to the transfer of the case from Shameen to Hong Kong.

Their Lordships are of opinion that s. 4, sub-s. 1, of the Foreign Jurisdiction Act, 1890, does not prevent this evidence from being admissible upon the question and that, in the absence of contradiction and of any grounds for real doubt, this evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong. It shews that, by "usage, sufferance or other lawful means," His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which Ibrahim belongs; that in the case of Ibrahim himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office de facto, and that they made no objection. Incidentally it disposes of a point taken in argument, that whatever jurisdiction may have been ceded, agreed, or suffered by the Imperial Government of China, it could not be deemed to persist by sufferance or otherwise since recent changes in the constitution and form of government of China took place. Even if such change had been proved, as it was not, or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, this evidence was sufficient to shew that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred. It was suggested that the Vice-Consul was not testifying to the exercise of jurisdiction and sufferance thereof in fact, but was only expressing his opinion that jurisdiction ought to extend to such a case as Ibrahim's, which he said was the first case committed to the Supreme Court from Canton. The judges of the Supreme Court, on the

hearing of the points reserved to the Full Court, did not so take it, neither do their Lordships, and were it not for the gravity and importance of the case they would not think it necessary to pursue this question of jurisdiction further.

Was Ibrahim a British-protected person because "by virtue of the Foreign Jurisdiction Act or otherwise he enjoys His Majesty's protection in China"? The words "or otherwise" must at least include the operation of other statutes, Imperial or Indian, applicable to the person in question, and the various legislative provisions referred to in the elaborate and valuable judgments in the Court below amply establish that, after enrolment and during service in the Indian Army, Ibrahim was a soldier of the Crown and subject to military law while stationed at Shameen. That being so, their Lordships think that it needs no express provision to entitle him to His Majesty's protection. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty, and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. Their Lordships are clearly of opinion that Ibrahim as of right "enjoyed His Majesty's protection" in China, and in virtue thereof was subject also to the jurisdiction of the Supreme Court of China.

Lastly, under this head reliance was placed on the words "and not otherwise" in art. V. (3.) of the Order. These words do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the Order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction, he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British-protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" in art. V. (3.) does not apply.

Their Lordships think it unnecessary further to pursue the

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points argued as to the necessity for proof of the Treaty of Tientsin, 1858; the validity of the proof of the Indian Army Act, 1911 (which, for reasons hereinafter appearing, is so formal a matter as to be immaterial on the present appeal); the conditions under which the Crown may enlist aliens in its Indian forces; and the effect of the preamble and recitals in the China and Corea Order in Council, 1904.

The second ground for this appeal is as follows: Some ten or fifteen minutes after Subadar Ali Shafa was shot Major Barrett, the officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major, "I said, 'Why have you done such a senseless act?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence . . . . ; when I spoke to accused I was sorry for him because he had killed the subadar." This last observation their Lordships treat only as evidence of the way in which the quesiion was put, tending to shew that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It was argued that Ibrahim's statement was inadmissible, (*a*) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (*b*) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner.

On this it becomes incumbent on their Lordships to consider the rule of English criminal law applicable to such circumstances. This somewhat exceptional duty arises because, by art. XXXV. (2.)

of the China and Corea Order in Council, it is provided that "subject to the provisions of this Order criminal jurisdiction under this Order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." There are no provisions in the Order material on this point as modifying or excluding the principles and practice of English law, and their Lordships think that the matter may be justly treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide that such law and practice are in all respects and particulars binding on that Court, nor do they overlook in any way the necessary distinction that must sometimes be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European judges, whose duty it is to have regard alike to the principles of British justice and to the necessities of local order. Nor do their Lordships fail to observe that the words "so far as circumstances admit" may well be applicable to such circumstances in the present case as the facts that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a subadar by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The

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principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg.* v. *Thompson* (1), a case which, it is important to observe, was considered by the trial judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *Reg.* v. *Thompson* (1) before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape,

(1) [1893] 2 Q. B. 12.

when it is to be considered as evidence of guilt, that no credit ought to be given to it" : *Rex* v. *Warwickshall.* (1) It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *Reg.* v. *Baldry.* (2) Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation: *Rex* v. *Thornton* (3); *Rex* v. *Wild* (4); *Reg.* v. *Kerr* (5); and even so late as in *Reg.* v. *Baldry* (2), a case decided on the rule as to hope and fear, Parke B. observes "by the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . . justice and commonsense have too frequently been sacrificed at the shrine of mercy." The law, however, was considered to be fairly settled: see *Reg.* v. *Cheverton* (6), *Reg.* v. *Reason* (7), *Reg.* v. *Fennell* (8), and the references collected in the note to *Reg.* v. *Brackenbury.* (9) When judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law (e.g.,

(1) (1783) 1 Leach, 263.
(2) (1852) 2 Den. Cr. C. 430, at p. 445.
(3) (1824) 1 Moo. C. C. 27.
(4) (1835) 1 Moo. C. C. 452.
(5) (1837) 8 C. & P. 176.
(6) (1862) 2 F. & F. 833.
(7) (1872) 12 Cox, C. C. 228.
(8) (1880) 7 Q. B. D. 147, at p. 150.
(9) (1893) 17 Cox, C. C. 628.

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Reg. v. *Pettit* (1); *Reg.* v. *Berriman* (2), a case when the accused was not yet in custody).

In 1885 *Reg.* v. *Gavin* (3) reopened these questions. In that case A. L. Smith J. excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross-examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893, Day J. (*Reg.* v. *Brackenbury* (4)) declined to follow this decision, in a case in which the question and answer preceded the arrest, and Cave J. in *Reg.* v. *Male* (5) rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence, though in 1896 (*Reg.* v. *Goddard* (6)) he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins J. (*Reg.* v. *Miller* (7)) allowed the accused's answers to be proved against him, when he had been cross-examined before arrest, saying that he did not expressly dissent from *Reg.* v. *Gavin* (3), but that "every case must be decided according to the whole of its circumstances," but in 1898 (*Reg.* v. *Histed* (8)) he excluded the answers of a prisoner in custody, on the authority of *Reg.* v. *Gavin* (3), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers* v. *Hawken* (9), a case of questions before arrest, a Divisional Court, consisting of Lord Russell C.J. and Mathew J., judges not prone to lean against a prisoner, held that the statement was admissible, and observed that "*Reg.* v. *Male* (5) must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances"; and in *Rex* v. *Best* (10) the Court of Criminal Appeal (including Channell J.) held that "it is quite impossible

(1) (1850) 4 Cox, C. C. 164.
(2) (1854) 6 Cox, C. C. 388.
(3) (1885) 15 Cox, C. C. 656.
(4) 17 Cox, C. C. 628.
(5) (1893) 17 Cox, C. C. 689.
(6) (1896) 60 J. P. 491.
(7) (1895) 18 Cox, C. C. 54.
(8) (1898) 19 Cox, C. C. 16.
(9) (1898) 67 L. J. (Q.B.) 526.
(10) [1909] 1 K. B. 692.

to say that the fact that a question of this kind has been asked invalidates the trial," adding that *Reg.* v. *Gavin* (1) is not a good decision. Here, however, it is to be observed that the actual decision was that under the proviso of s. 4 of the Criminal Appeal Act, 1907, the Court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority. The point has been before the Court of Criminal Appeal more recently. In 1905 (*Rex* v. *Knight and Thayre* (2)) statements were rejected because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. Channell J. adverted thus to the case of questions put by a constable after arresting: "when he has taken any one into custody . . . . he ought not to question the prisoner . . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence." The same learned judge in *Rex* v. *Booth and Jones* (3) in 1910 observes, "the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter"; and of this Darling J., delivering the judgment of the Court of Criminal Appeal, observes the "principle was put very clearly by Channell J."

The learned trial judge in the present case, in addition to the argument of counsel for the defence, had before him a case decided in 1908 by the Full Court at Hong Kong, *Rex* v. *Wong Chiu Kwai* (4), in which the English authorities up to that time were very fully examined. Before admitting the evidence of the

(1) 15 Cox, C. C. 656.
(2) (1905) 20 Cox, C. C. 711.
(3) (1910) 5 Cr. App. Rep. 177, at p. 179.
(4) 3 Hong Kong L. R. 89.

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appellant's statement he consulted Gompertz J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford* v. *The King-Emperor*. (1) Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some

(1) (1913) L. R. 40 Ind. Ap. 241.

clear departure from the requirements of justice" exists: *Riel* v. *Reg.* (1); nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done": *Dillet's Case.* (2) It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's Case* (1); *Ex parte Deeming.* (3) The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea.* (4) There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertrand.* (5)

Their Lordships were strongly pressed in argument with the case of *Makin* v. *Attorney-General for New South Wales* (6), in which Lord Herschell L.C. delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically obiter dicta, since the Board held that the evidence complained of at the trial had been rightly admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *Rex* v. *Dyson* (7), though with some later qualification. In *Makin's Case* (6), however, their Lordships had to determine the true construction of s. 423 of the New South Wales Act, 46 Vict. No. 17, which, in defining a strictly appellate jurisdiction in criminal matters, provided "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice." It was held there that to transfer the

(1) (1885) 10 App. Cas. 675.
(2) (1887) 12 App. Cas. 459.
(3) [1892] A. C. 422.
(4) [1893] A. C. 346.
(5) (1867) L. R. 1 P. C. 520.
(6) [1894] A. C. 57.
(7) [1908] 2 K. B. 454.

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decision of the guilt of the accused from a jury, acting on oral testimony, to an appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that a Court of Criminal Appeal is not entitled to dismiss the appeal by retrying the case on shorthand notes, or by holding that, if the trial judge had excluded the evidence which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory Court of criminal review with the functions of the original trial judge and jury. This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's Case* (1), however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury," and this reservation is not to be taken as exhaustive. In England, where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict—*Rex* v. *Lucas* (2); *Rex* v. *Stoddart* (3); *Rex* v. *Norton* (4); *Rex* v. *Loates* (5); *Rex* v. *Wilson* (6)—or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance—*Rex* v. *Westacott* (7); *Rex* v. *Mullins* (8)—or most unlikely to have affected the verdict: *Rex* v. *Solomon.* (9) Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction: *Rex* v. *Fisher.* (10) The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute "highly

(1) [1894] A. C. 57.
(2) (1908) 1 Cr. App. Rep. 234.
(3) (1909) 73 J. P. 348.
(4) [1910] 2 K. B. 496, at p. 501.
(5) (1910) 5 Cr. App. Rep. 193.
(6) (1911) 6 Cr. App. Rep. 207.
(7) (1908) 1 Cr. App. Rep. 246.
(8) (1910) 5 Cr. App. Rep. 13.
(9) (1909) 2 Cr. App. Rep. 80.
(10) [1910] 1 K. B. 149.

improbable" for "impossible" in Lord Herschell's reservation above quoted.

Their Lordships think that the jurisdiction which they exercise in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows.

During the hot weather of 1912 the sepoys of the 126th Baluchistan Regiment at Shameen lived and slept a great deal in the open air. The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the avenue. On the night in question the native officers, including Subadar Ali Shafa, were sitting in chairs near the road. Ibrahim and three other sepoys were not far off in a group playing cards. The time was about 10.30 P.M. The subadar went up to them, accused them of gambling, searched them, took away $3.80 of Ibrahim's money, and ordered them to be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the subadar, after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his rifle in the direction of the place where the native officers were sitting. This last significant fact was elicited by the jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, identified by its number. Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in the magazine of his rifle, the bolt of which was open; one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized.

This story, which did not depend at any point on the evidence of one witness only, was amply corroborated in various ways.

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Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing, the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave, or otherwise. They will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellant: *Langlois, Harding, Warren & Tate.*
Solicitors for respondent: *Sutton, Ommaney & Rendall.*

[PRIVY COUNCIL.]

J. C.* 1913 *Oct.* 17, 26; *Nov.* 27; *Dec.* 16.

PAYANA REENA SAMINATHAN AND ANOTHER . . . . . } APPELLANTS;

AND

PANA LANA PALANIAPPA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Practice — Cause of Action — Promissory Note — Consideration for Note — Separate Causes of Action — Ceylon Civil Procedure Code (Ordinance 2 of 1889), s. 34.

Sect. 34 of the Ceylon Civil Procedure Code, 1889, provides that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that a plaintiff cannot afterwards sue for a part of the claim omitted from an action, or (without leave) for another remedy for the same cause of action. The respondent sued upon promissory notes, but the action failed owing to a material alteration in the notes. He afterwards sued

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* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

to recover a part of the consideration for which the promissory notes had been given:—

Held, that although the claims in the two actions arose out of the same transaction, they were in respect of different causes of action, and that, consequently, the second action was not brought contrary to s. 34 of the Code and could be maintained.

APPEAL from a judgment of the Supreme Court of the Island of Ceylon (April 4, 1912) reversing a judgment of the District Court of Colombo (December 18, 1911).

The appeal raised a question as to the effect of s. 34 of the Ceylon Civil Procedure Code, 1889, which section is set out in their Lordships' judgment.

The respondent in 1909 made a claim against the appellants for money received by them as the respondent's agents. This claim was referred by the parties to two arbitrators. The arbitrators found that the sum of Rs.28,224 was due, and that it was to be satisfied by the payment of Rs.224 in cash and by two promissory notes for Rs.14,000 each. These terms were agreed to by the parties, the cash was paid and the promissory notes given.

On October 18, 1909, the respondent commenced an action in the District Court of Colombo on the two promissory notes. At the trial it appeared that a material alteration had been made in the promissory notes by one of the arbitrators at the request of the respondent. The action was accordingly dismissed.

On April 26, 1910, the respondent commenced (without the leave of the Court) a second action against the appellants claiming payment of two sums of Rs.11,526 and Rs.771, two of the items of the aggregate award of Rs.28,224.

On December 18, 1911, the District Judge dismissed the action on the ground that upon the facts as found by him the promissory notes were given in absolute discharge of the Rs.28,000 due under the award. He also held that the action failed by reason of the provisions of s. 34 of the Ceylon Civil Procedure Code, 1889, being of opinion that the claim upon the notes and that made in the action were two remedies for the same cause of action.

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The Supreme Court, by its judgment delivered on April 4, 1912, reversed this decision. The learned judges (Lascelles C.J. and Wood-Renton J.) held that the appellants had failed to discharge the onus of rebutting the presumption that the promissory notes were given in conditional payment, and further that the respondent was not precluded by the judgment in the previous action from bringing the present action.

P. O. Lawrence, K.C., *H. E. Miller*, and *E. J. Samerawickrame*, for the appellants. On the evidence the District Judge rightly held that the two promissory notes were given in absolute discharge of the debt. If, however, the Supreme Court was right in holding that the onus of rebutting the presumption that they were only conditional payments was not discharged, the action fails owing to s. 34 of the Ceylon Civil Procedure Code, 1889. The respondent's cause of action was the failure to pay the money awarded; the claim upon the promissory notes and the claim for the sum awarded were merely different remedies for that cause of action. The Ceylon Code, in s. 5, contains a wide definition of "cause of action." There is no definition of that term in the Indian Civil Procedure Code, 1859, consequently the decisions upon s. 7 of that Code referred to in the judgment appealed from are distinguishable: *Rajah of Pittapur* v. *Venkata Mahipati Surya* (1); *Amanat Bibi* v. *Imdad Husain*. (2)

[Their Lordships intimated that they were satisfied that the notes were given as conditional payment.]

Cave, K.C., *Dornhorst, K.C.*, and *R. W. Lee*, for the respondent. The claims in the two actions were in respect of separate causes of action and were not merely different remedies for the same cause of action. The provision at the end of s. 34 that an obligation and a collateral security for its performance shall be deemed to constitute one cause of action indicates that where a promissory note is given in conditional payment of a debt there are two causes of action within the meaning of the section. [*Wegg Prosser* v. *Evans* (3) was referred to.]

P. O. Lawrence, K.C., in reply.

(1) (1885) L. R. 12 Ind. Ap. 116. (2) (1888) L. R. 15 Ind. Ap. 106.
(3) [1895] 1 Q. B. 108.

The judgment of their Lordships was delivered by

LORD MOULTON. The respondent is a money-lender carrying on business in Colombo, and the first appellant was for a time his agent and manager. He was at the same time carrying on business as a money-lender in partnership with the second appellant.

For about three and a half years prior to June, 1909, the respondent was absent from Ceylon, and the first appellant carried on his business during his absence. On his return serious disputes arose between them. The respondent alleged that there was a large balance due to him from the first appellant and also that the first appellant had not credited the respondent with certain profits made by discounting promissory notes at the banks for firms in which the second appellant was a partner. Ultimately all the parties to the present suit agreed that these disputes should be referred to two other money-lenders named Romanathan Chetty and Mutu Ramen Chetty, who, after the completion of the investigation, drew up, on August 30, 1909, what has been termed "a receipt," which the appellants signed, the arbitrators witnessed, and the respondent accepted and acted upon. This document deals seriatim with seven sums thereby admitted to be due from the appellants to the respondent amounting in all to Rs.28,224, and it then proceeds as follows:

"And this sum of Rs.28,224 we have this day settled with you in the following manner:—Rs.224 paid to you by us this day in cash, Rs.14,000 by an on demand promissory note, payable with interest on 15th September, and Rs.14,000 by another on demand promissory note given on the same date, payable with interest on 30th November, all aggregating to Rs.28,224. And this matter having been thus arranged and settled in respect of all the accounts between us, this receipt shall be the witness that there is no other claim against us by you or by us against you."

Accordingly Rs.224 were thereupon paid by the appellants to the respondent, and two promissory notes, each for a sum of Rs.14,000, were handed to him. Their Lordships entertain no doubt that, although informally conducted, the proceeding was

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in the nature of an arbitration, and the so-called "receipt" expresses the finding of the arbitrators, and the mode in which it was to be performed. But the question whether or not it should so be regarded is immaterial for the decision of the present appeal. The "receipt" given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt." It is a clear example of what used to be well known in common law pleading as "accord and satisfaction by a substituted agreement." No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

There appears to be no doubt that it was the intention of all the parties that the sums for which the promissory notes were given should bear what is known as chetty interest, which is at a rate dependent on the current bank rate, and would in the present case have been between 6 per cent. and 7 per cent. But, probably by an oversight, no rate of interest was inserted in the promissory notes, and the respondent, without communication with the appellants, went to one of the arbitrators and persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. Though this was an irregularity of a grave kind, their Lordships do not understand that it was done with bad faith either on the part of the arbitrator or the respondent. It appears to have been the result of a misunderstanding, and accordingly their Lordships treat it as a material alteration innocently made.

On October 18, 1909, the respondent commenced an action in the District Court of Colombo upon the two promissory notes so given to him. The appellants raised as a defence that a material alteration had been made in them, and on this ground the action was dismissed on February 8, 1910.

On April 20, 1910, the respondent commenced the present action for the two sums of Rs.11,526 and Rs.771. These were two out of seven items referred to in the receipt, all going towards making up the total of Rs.28,224 which was the basis of the new agreement. The form of the plaint is such that it is clear that the respondent was attempting to assert in the action two of the claims which were included in the award and settled by the new agreement. This he was not entitled to do since they had been extinguished by the acceptance of the new agreement.

At the trial of the action the District Judge found in favour of the appellants, on the ground that the two promissory notes were given in absolute payment of the debt, and that, therefore, no remedy remained to the respondent, excepting upon those notes. On appeal, the judges of the Supreme Court held that the notes were only accepted as a conditional discharge, so that they only amounted to payment if paid, and that, inasmuch as they had not been paid, the original debt of Rs.28,000 remained. They accordingly allowed the appeal. It is from this decision that the present appeal is brought.

Their Lordships are of opinion, as has already been stated, that the form of the claim was faulty inasmuch as the sole existing liability was under the agreement set out in the receipt. But they are also of opinion that the arrangement for the discharge of the amount found due by means of the promissory notes only expressed the mode of payment contemplated and arranged for at the time. This was essentially a matter of form only, the substance of the award being that the specified amount was actually due from the appellants to the respondent. Through an innocent act the promissory notes have become incapable of being enforced, and the appellants have availed themselves of this and have refused to pay the notes, so that payment in the form contemplated has failed. But this does not affect the substance of the award or the basis of the arrangement, which was liability, and therefore it was open to the respondent to bring an action for the unpaid balance of the sum found due, i.e., for the amount of the promissory notes. He has brought his action for an amount less than this and based it on wrong grounds, but, on the other hand, the appellants omitted to raise their true defence

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in their pleadings, when there would have been an opportunity for the respondent to correct the grounds of his claim.

The learned judge at the trial held that this action was barred by s. 34 of the Ceylon Civil Procedure Code, and counsel for the appellants relied strongly upon this section in the argument before us. On account of the importance of the point it is desirable to cite the section in full: "Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

"If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

Their Lordships are of opinion that the learned District Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section.

Viewed thus, it is evident that a claim on the promissory notes and a claim for the amount found due under the award and for

which payment was provided by the agreement are not the same cause of action, but are in truth inconsistent and mutually exclusive causes of action. So long as the notes were outstanding there was no right of action otherwise than upon the notes. It is therefore impossible, in their Lordships' opinion, to hold that the claim for the amount due was the same cause of action as the claim upon the notes and ought to have been included in the prior action.

Their Lordships therefore think that justice will be done by treating the sum sued for as being part of the amount found due by the arbitrators, the payment of which was provided for by the agreement and in respect of which the promissory notes were given. They hold that, as such, it is recoverable by the respondent, and that the appeal should be dismissed. But this amendment will entail the consequence that inasmuch as the respondent has sued for a part only of the total sum due he cannot bring a fresh action for the remainder.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, but without costs.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Holman, Birdwood & Co.*

[PRIVY COUNCIL.]

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WASSAW EXPLORING SYNDICATE, LIMITED . . . . . } Appellants;

AND

AFRICAN RUBBER COMPANY, LIMITED . Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

Concessions in Gold Coast Colony—Certificate of Validity—Demise of Surface—Exclusive Right—Modification of Concession by Certificate—Adjustment of Terms upon Opposition—Concessions Ordinance (*No.* 14 *of* 1900), *ss.* 13 *and* 16.

In 1906 the respondents obtained a concession over territory in the Gold Coast Colony; this concession was in the form of a demise and expressly conferred the right (inter alia) to mine and to cut timber for any purposes. In 1909 the appellants obtained a concession over lands which included part of the above-mentioned territory; this concession also was in the form of a demise and conferred on the appellants "exclusive liberty" to mine and to cut timber for mining purposes. The appellants in 1910 obtained a certificate of validity under the Concessions Ordinance, 1900, and subsequently opposed an application made by the respondents for a certificate in respect of their concession:—

Held, that although the appellants' certificated concession was in the form of a demise, and was expressed to give them an exclusive right, it did not preclude the issue of a certificate of validity to the respondents, but that the appellants were entitled to remain parties to the application until the terms of a certificate with such modifications or conditions as would preserve their rights had been settled by the Court under ss. 13 and 16 of the Ordinance.

Appeal from a judgment of the Supreme Court of the Gold Coast Colony (February 24, 1913) affirming a judgment of the Concessions Division of that Court (July 29, 1912).

The appeal arose out of an application made by the respondents to the Concessions Division to certify a concession which they had obtained in 1906. The application was opposed by the appellants, who in January, 1910, before the issue of a certificate to the respondents, had obtained certification in respect of a

* *Present:* Lord Atkinson, Lord Shaw of Dunfermline, Lord Moulton, and Lord Sumner.

concession over land which included part of that contained in the respondents' concession. The terms of the appellants' and of the respondents' concessions and the circumstances of the case appear from their Lordships' judgment.

The Concessions Division of the Supreme Court, on July 29, 1912, disallowed the appellants' opposition, and the Full Court, by a judgment delivered on February 24, 1913, affirmed this decision.

Younger, K.C., and *J. W. M. Holmes*, for the appellants. Upon the true construction of the appellants' concession they have a demise of the surface of the lands comprised in it and in addition an exclusive right to commit specified acts of waste by mining and cutting timber. They have obtained a certificate for this concession and are entitled under it to exclude the respondents from cutting any timber upon their lands: *Carr* v. *Benson* (1) ; *Newby* v. *Harrison*. (2) In any case the appellants were entitled to remain parties to the proceedings until a form of certificate under s. 16 was settled so as to protect their rights.

Greer, K.C., *Owen Thompson*, and *C. E. O. Carter*, for the respondents. The appellants' concession, together with the certificate in respect of it, is limited to mining rights and to the cutting of such timber as may be required for purposes ancillary to mining. Their rights are in no way extended by the fact that the concession is in the form of a demise or by the use of the word "exclusive." The respondents are entitled to a certificate of validity for their concession subject to such conditions as will protect the limited rights which the appellants possess under their concession and certificate.

J. W. M. Holmes, in reply, referred to *Duke of Sutherland* v. *Heathcote* (3) as to the effect of an exclusive right.

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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Full Court of the Supreme Court of the Gold

(1) (1868) L. R. 3 Ch. 524, at p. 532.
(2) (1861) 4 L. T. (N.S.) 424.
(3) [1892] 1 Ch. 475, at p. 484.

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Coast, which affirmed a judgment of the Concessions Division of that Colony.

There is in operation in the Colony the Concessions Ordinance of the year 1900, as amended by subsequent Ordinances of the years 1901, 1902, 1903, and 1905. The Ordinance in question in the present case is No. 14 of the year 1900. Under that Ordinance a Divisional Court of the Supreme Court has jurisdiction to inquire into and certify as valid or invalid any concession, and by s. 8 it is provided that "no proceedings shall, without the leave of the Court, be taken to give effect to any concession unless such concession has been certified as valid by the Court." The question before their Lordships arises out of a decision by this Concessions Court.

Generally speaking, one may say that the object of this legislation is for the protection of the natives and the native chiefs, for the validation by the Court, upon inquiry, of concessions granted of mining rights, rights of cutting trees, &c., and for the regularizing of the rights of competing concessionaires by establishing priority among them inter se. On this last point s. 23 provides that "a certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto."

In 1906 the respondents, the African Rubber Company, obtained a concession by agreement between Chief Cudjoe Sah of Arkwasu, on behalf of himself, his heirs and successors, and his tribe, by which the lessors granted, let, and demised to the respondents a parcel of land containing an area of five square miles "and all rubber, vines, fruits, trees, root and grass rubber, timber of all description, and surface rights and property in the said surface land and premises." Full and exclusive powers and liberty were granted to the respondents and their assigns to collect rubber, make clearings, construct farms, and to grow rubber or any other produce. The letting and demise also included all mines, mineral substances, precious stones, and gave power to erect buildings, roads, and the like, and to divert watercourses, "and to do all acts matters and things so absolutely and effectively" as if the respondents and their assigns were, for the term thereby "intended to be demised,

absolute owner of the fee simple." With regard to timber the grant was expressed thus: "with liberty to cut, remove, and fell, and carry away all trees timber shrubs and plants either for the purpose of carrying on the works of the lessees or for the purpose of sale."

As stated, this agreement was made in 1906. An application was made in the end of 1909 for a certificate validating this concession. This was opposed by the appellants, the Wassaw Company, and on July 29, 1912, the judgment appealed from, disallowing the Wassaw Company's opposition, was pronounced. The locus standi of the Wassaw Company, the appellants, was this: In 1909 they had obtained a concession from the succeeding chief of certain territory, part of which was the same as that contained in the concession granted to the respondents three years before. But the appellants promptly, that is to say, in the beginning of January, 1910, applied for and obtained a certificate of validity. So far as the dates go, accordingly, the appellants' certificate which was recorded on January 4, 1910, has priority to that of the respondents.

The Wassaw Company now pleads its right, under the demise to it, altogether to exclude the African Rubber Company from the overlapping portion of the territory, to prevent it from either planting or cutting trees thereon, and in short to treat it in going upon the land for any purpose as a trespasser. This was the argument presented to their Lordships.

The Wassaw Company's lease is printed. It is true that it is expressed to be "a demise and grant" of a certain parcel of land, together with all the mines and minerals therein. The period of the grant is for ninety-nine years. There then follow clauses beginning: "It is hereby agreed and declared that during the continuance of this demise the company shall have full free and exclusive liberty" to sink and make pits, erect bridges, use ground as timber-ground, take and carry away minerals, make tram-roads, "and also to cut, hew down, and fell and take away any timber or trees on the said lands for the use of the steam engines and machinery used in the said mines and for the erection and maintenance of any buildings, works, and contrivances thereon." It is upon the earlier portion of this

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clause, as a comprehensively exclusive demise, that the appellants take their stand.

Their lease further proceeds to give power to divert and turn water and watercourses "for the purpose of more effectually exercising and enjoying the liberties and privileges and easements hereby granted," and also to do all necessary acts or use all necessary devices "for the efficient working of the mines and premises hereby demised." The demise concludes by giving to the company peaceable possession in these terms, which their Lordships think are important, namely: That they shall "peaceably and quietly possess and enjoy the mines and premises hereby demised and exercise the rights and privileges hereby conferred without any interruption by the chief," &c.

The appellants in certain portions of their written grounds of opposition appear to concede the practical limits of the rights thus conferred upon them. They confine their position to that of mining lessees, and they claim "the right to such timber as may be required for purposes ancillary to such mining, with the usual incidental powers and rights necessary for the beneficial enjoyment of such concession." Standing their priority on the concession record, this appears to their Lordships to be a correct statement of the measure of their rights. This the respondents, the African Rubber Company, have never disputed. And it ought to be further added, in fairness to the Courts below, that in those Courts this measure was never questioned or denied. Nor do their Lordships see any occasion to doubt that, suppose the proceedings had gone to the further stage of granting to the respondents a certificate of their (the respondents') title, that certificate would have been so worded as amply to protect any prior mining rights and all rights ancillary thereto which had been created in the appellants by their first validity concession.

It is now maintained, however, by the appellants, and it appears also to have been so argued in the Courts below, that the terms employed in their lease are of such a character as to give them a demise of the land itself with the exclusive possession for ninety-nine years thereof and of all the timber thereon, and with a right also to prevent trespass on any part of the area in

question. Their Lordships cannot so construe the rights of the appellants.

In the first place, it has to be observed that a right of exclusion of this character as arising out of the agreement of lease if treated as a demise of land does not appear to be within the definition of "concession" or to be the subject of validation by the Concessions Court, or to gain any priority thereby. By the Ordinance "concession" means "any writing whereby any right interest or property in or over land with respect to minerals precious stones timber rubber or other products of the soil" purports to be granted by a native. This definition does not extend to a demise of the surface of the land, nor does it extend to a sale or lease of the land itself. Even if the lease were construed as a demise of the land it is something which is not a concession and to which priority under the Concessions Ordinance has no application.

In so far, moreover, as the lease bears this character it cannot be pleaded in a question with the respondents, the African Rubber Company, who three years before had in fact obtained a title of a similar or rather of a much broader character and not confined to mining purposes or purposes ancillary thereto. What is being done, as their Lordships understand, is that the respondent company, under their lease of 1906, are cutting certain rubber trees and planting others, and developing the property in an agricultural and arboricultural sense. All this, subject to the appellants' mining needs, appears to be within the respondents' just rights.

The next point, however, is the general one and is of importance. The appellants, having got first on the concessions record with their mining lease, propose to prevent these operations of the respondents upon the area in question because of the use of the word "exclusive" in that lease. They admit that they could not develop this territory themselves, indeed that they could not cut a tree upon it, except for their mining purposes. But they construe their rights as if the lease entitled them to prevent any development of this large tract of land by any one else. Their plea is that it can never be known, if, say, trees were cut down, whether in the course of a century they, the

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Wassaw Company or their successors, might not come to require those trees. In their Lordships' opinion this plea is not well founded. Although the term "exclusive" is employed it has to be admitted that this term must be taken along with one specific and particular purpose and the strictly limited nature of the rights of mining which are the subject of the grant. Accordingly the word cannot be comprehensively interpreted. For the result, upon such an interpretation, would produce a quite impracticable situation.

The Concessions Ordinance entirely covers such a case. It is provided under s. 13 that "it shall be lawful for the Court in its discretion to make such modifications in the terms of any concession and to impose such conditions with respect to the issue of any certificate of validity as to the Court shall seem just." It is then provided by s. 16 that the certificate of validity shall inter alia contain a statement "of any limitations, modifications and conditions imposed by the Court." Nothing could more clearly indicate that in the case of rival claims to, or overlapping rights in, any area which is the subject of a concession, the Court can adjust the rights of parties by exercising their discretion and having the practical regulation of these rights determined on the spot.

Their Lordships accordingly must repel the plea put forward by the appellants in this case in so far as it is a claim for exclusive possession of land, or for a right to exclude the respondents from it, or from exercising upon it all such rights of cutting and planting timber and the like as do not in point of fact invade the rights of the appellant company as mining lessees.

It is with regret, however, that their Lordships have to observe that the actual order made in this case, in so far as it dismissed the opposition of the appellants at a stage prior to the actual terms of the certificate to be proposed being announced, was premature. The judgment referred to is that of February 24, 1913. The Court, says that judgment, "is of opinion that the grantor retained the right to grant concessions subject to the prior rights of the opposers under their certificate of validity." This opinion, their Lordships think, was correct. But when

the order proceeded, "The Court is therefore of opinion that the Court of first instance was justified in dismissing an opposition which appears to be based entirely upon hypothetical grounds," their Lordships unfortunately cannot agree. The appellants hold a title by their prior certificate to what was to some extent a competing right in regard to the same area of ground, and in these circumstances they think that the appellants had a right to remain in Court until the terms of the certificate came to be adjusted. Their Lordships do not doubt that, now that the claim of the appellants on the arguments submitted has been settled in the negative, the certificate of validity of the concession to the respondents will be dealt with by making such limitations, modifications, and conditions as will conserve the mining rights of the appellants and those rights of cutting timber which are ancillary thereto.

In the circumstances the orders for costs in the Courts below will not be disturbed, but their Lordships will humbly advise His Majesty to allow the appeal, and to remit the case to the Supreme Court, so that the proper steps may be taken for issuing to the respondents a certificate with the requisite limitations, modifications, and conditions, the respondents having leave to object thereto if so advised. Their Lordships are not inclined to think that the appellants would have been prejudiced by allowing the case to go forward to a certificate, the views of the Court in the direction of protecting their (the appellants') rights having been made plain. There will be no costs of the present appeal.

Solicitors for appellants: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Fraser & Christian.*

[PRIVY COUNCIL.]

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AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY, LIMITED . . . } Appellants;

AND

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED . . . . } Respondents.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Insurance (Life)—Re-insurance—Construction of Policy—Statements Basis of Contract—Settlement of Claim by Re-insured—Liability of Re-insurers.

By a policy dated January 2, 1908, the respondents insured the life of M. for 5000*l.* with profits, the policy providing that certain written statements made by M. as to his health should be the basis of the contract, and that the policy should be void if they were untrue. By a proposal form of the same date the respondents applied to the appellants to re-insure M.'s life for 5000*l.* This proposal contained a provision that in accepting the risk the appellants did so on the same terms and conditions as those on which the policy had been granted by the respondents, "by whom, in the event of claim, the settlement will be made." The appellants on January 28, 1908, issued a policy of re-insurance for 5000*l.*, but limited to the amount which the respondents should pay irrespective of any bonus. The policy recited that the written statement of M. was the basis of the contract, also that the appellants had agreed to accept the respondents' proposal. M. died in May, 1909, and a claim was made against the respondents by his executrix. The appellants informed the respondents that they had reason to believe that some of the statements made by M. were untrue and warned them that they would not acquiesce in a settlement. The respondents, however, paid 5000*l.* in settlement of the claim and sued the appellants upon the policy of re-insurance. The jury found that certain of M.'s statements were untrue and that he had been guilty of concealment and misrepresentation, but that the respondents, in settling the claim, had acted reasonably and bona fide:—

Held that, assuming that the provision in the proposal form that a settlement should be effected by the respondents was incorporated in the policy of re-insurance, that provision could not alter the express terms of the policy which warranted the truth of M.'s statements, and that, the jury having found those statements to be false, the appellants were not liable.

Appeal, by special leave, from a judgment of the High Court of Australia (May 27, 1912) dismissing an appeal from a judgment

* *Present:* Viscount Haldane L.C., Lord Dunedin, Lord Shaw of Dunfermline, Lord Moulton, and Lord Parker of Waddington.

of the Full Court of Victoria (October 12, 1911) which set aside a judgment of the Chief Justice of Victoria (April 10, 1911) at the trial with a jury.

The question for determination in the appeal was whether, upon the true construction of a policy by which the appellants re-insured a life insured by the respondents, the appellants were liable to the respondents in respect of a settlement made by the latter, but not acquiesced in by the appellants.

The facts appear from the head-note and more fully from the judgment of their Lordships.

In their statement of claim, delivered on January 29, 1910, the respondents set out the facts as to the policies, including the provision in the proposal for re-insurance, the death of the assured (Moran), and the claim of the executrix, and stated that they had investigated the claim, had been satisfied as to its validity, and had paid it. The appellants by their defence alleged that the statements of Moran, which were made the basis of the contract of re-insurance, were false in various specified respects, and that he had been guilty of concealment and misrepresentation in obtaining the policy of insurance. They further pleaded that they were not bound by the alleged fact that the respondents had been satisfied as to the claim and had paid it. By their reply the respondents contended that they did not warrant the truth of the statements made by Moran. They also relied on the provision contained in the proposal form for the re-insurance that in the event of a claim upon the original policy the settlement thereof was to be made by the respondents, and upon the fact that the settlement had been made in good faith.

The action was tried before the Chief Justice of Victoria with a jury, to whom the learned judge left a number of specific questions. The effect of the jury's answers was to find that Moran, the assured, had made false statements as to his health in his "personal statement" to the medical officers of the respondents, and that the statement contained in his proposal to the respondents, that he was not aware of any circumstances affecting the risk beyond what might be disclosed in his "personal statement," was untrue. They also found that the respondents

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in becoming satisfied of the validity of the claim and in paying it acted reasonably and in good faith and in the honest exercise of their discretion, if they had any such discretion. Upon these findings the Chief Justice, on April 10, 1911, after hearing arguments, entered judgment for the appellants.

The respondents appealed to the Full Court of Victoria, which, on October 12, 1911, by a majority (Hodges and Hood JJ., à Beckett J. dissenting) allowed the appeal and entered judgment for the respondents.

The present appellants appealed to the High Court of Australia, which on May 27, 1912, by a majority (Griffith C.J. and Barton J., Isaacs J. dissenting) dismissed the appeal.

The learned Chief Justice in the course of his judgment said there was no magical effect in the words in the policy of re-insurance by which the statements were made "the basis of the contract," and that their meaning and effect could only be ascertained by considering the whole instrument. He was of opinion that, upon the true construction of the policy of re-insurance, the respondents did not warrant the truth of Moran's statements, but only that the information appearing in his statement was all the information which they possessed on the subject of his health. He held, further, that the words in the proposal form "by whom the settlement will be made" availed to bind the appellants by a bona fide settlement made by the respondents. Barton J. agreed with the reasoning and result of the judgment of the learned Chief Justice. Isaacs J. dissented. He held that the recital in the policy of re-insurance of the statements of Moran as "the basis of the contract" constituted a warranty of their truth, and that the words in the proposal form as to the settlement of the claim could not be used to qualify this initial stipulation as to the basis of the contract.

Leslie Scott, K.C., and *Mackinnon*, for the appellants. The policy of re-insurance recites that the statements contained in Moran's "personal statement" to the medical officers are the basis of the contract. Upon the finding of the jury that this statement contained untruths the appellants were entitled to judgment. If the provision for the settlement of claims by the

respondents is incorporated, it must be so construed as not to contradict this express provision. It only means that the payment of a claim is to be made by the respondents and not by the appellants; it does not give the respondents an irrevocable power to compromise claims so as to bind the appellants. There was no legal claim by the executrix, for upon the findings of the jury there was a breach of a condition precedent in the respondents' policy and, therefore, it never attached: *Thomson* v. *Weems*. (1)

[They were stopped.]

Sir R. Finlay, K.C., and *Cababé*, for the respondents. In construing the policy of re-insurance it is necessary to have regard to the surrounding circumstances and to business considerations. The real nature of the transaction was one of re-insurance and, subject to some variation in the amount payable under the respective policies, of indemnity. The clause in the proposal for re-insurance is incorporated by the recital that the appellants have agreed to accept the respondents' proposal, and effect must be given to the final words of that clause which provide that in the event of a claim the settlement is to be made by the respondents. The word "settlement" in this clause means a settlement of the question whether the sum insured shall or shall not be paid. It was unnecessary to provide that the payment of a claim upon the original policy should be made by the respondents, since there was no privity of contract between the assured and the appellants. The clause does not contradict the recital that the statements of Moran are the basis of the contract, but merely qualifies the effect of that recital. The respondents by their policy had agreed to pay within thirty days; they had therefore to determine within that time whether they were in a position to defend a claim. It is reasonable to suppose that the intention of the policy of re-insurance was that if the respondents bona fide concluded that they could not successfully resist a claim and accordingly paid, then the appellants were to be liable.

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April 23.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The facts out of which this appeal arises are shortly as follows. The respondent association,

(1) (1884) 9 App. Cas. 671.

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having granted to one Patrick Moran a policy of assurance on his life for 5000*l.* with profits, re-insured his life with the appellant society for the same amount without profits, the liability of the re-insurers being expressly limited to what was paid (irrespective of bonus additions) under the original policy. Patrick Moran died, and the respondent association, having, notwithstanding the protest of the appellant society, paid to his legal personal representative the sum of 5000*l.*, sued the appellant society for that amount under the policy of re-insurance. The appellant society contended that its liability under the policy of re-insurance, as also the liability of the respondent association under the original policy, was conditional on the truth of certain statements made by Patrick Moran when he effected the original policy, and that these statements were false, and false to his knowledge. The respondent association put the falseness of these statements in issue, and further alleged that whether the statements in question were true or false it had acted reasonably and in good faith in admitting and settling the claim on the original policy, and that the appellant society was under the terms of the policy of re-insurance bound by such settlement and could not rely on the untruth of the statements in question. The action was tried before the Chief Justice of Victoria and a special jury. The jury found the statements in question to have been false, and false to the knowledge of Patrick Moran, but they also found that the respondent association in settling the claim on the original policy acted reasonably and in good faith and in the honest exercise of its discretion to settle such claim so as to bind the appellant society, if it in fact had any such discretion. On these findings the Chief Justice dismissed the action, holding that on the true construction of the policy of re-insurance the liability of the appellant society was conditional on the truth of the statements which the jury had found to be false, and that the appellant society was not bound by the settlement effected by the respondent association of the claim against it on the original policy. On appeal the Full Court of Victoria by a majority reversed the decision of the Chief Justice, and directed judgment to be entered for the respondent association for the amount claimed. The High Court of Australia by a majority confirmed

the decision of the Full Court, and the appellant society is by special leave appealing from the order of the High Court. The result of the appeal depends entirely on the construction to be placed on the two policies and in particular on the policy of re-insurance. Their Lordships will therefore proceed to examine the terms of these documents in greater detail.

The original policy was dated January 2, 1908. It recited that the assured had lodged with the respondent association a proposal and declaration and had made a personal statement to a medical officer of that association, which proposal, declaration, and personal statement formed the basis of this contract. By the operative part of the policy the respondent association contracted to pay the sum assured or other the moneys payable thereunder within one calendar month after the death of the assured, with a proviso postponing payment until such proof of the identity of the claimant, the validity of the claim, and the age of the assured as the directors should consider necessary had been deposited with the association. The policy contained a clause to the effect that the policy should be avoided and all moneys paid thereunder forfeited to the association in any of the events therein specified, that is to say, (*a*) if any premium should be unpaid for thirty days after it became payable, but so that if the policy had a surrender value such surrender value should be applied by the directors in payment of the premium in arrear; (*b*) if the proposal or any document on the faith of which the policy was granted contained any untrue statement, or if the person making the proposal had with a view of obtaining the policy made any false statement or been guilty of any concealment or misrepresentation; and (*c*) if the person assured committed suicide within thirteen months from the date of the policy, with a proviso for the protection of bona fide assigns for value. The policy also contained a clause reducing the sum assured and the amount payable in respect of profits, if the age of the assured had been understated.

It is not and, in their Lordships' opinion, having regard to the principle laid down in *Thomson* v. *Weems* (1), could not be disputed that under this policy the liability of the respondent

(1) 9 App. Cas. 671.

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association was conditional on the truth of every statement of fact contained in the several documents made the basis of the contract, except the statement as to the age of the assured, with regard to which special provision is made. The assured had, as a matter of fact, made two personal statements, one to Dr. Stokes and one to Dr. Warren, each of these gentlemen being a medical officer of the respondent association. Both statements were substantially to the same effect, and one of them (it does not matter which) is no doubt the statement referred to in the policy.

The policy of re-insurance was dated January 29, 1908. It recited that the respondent association having an interest in the life of the assured had, by a proposal and declaration dated January 2, 1908, applied to the appellant society to have such life assured in the appellant society by effecting a policy on such life payable within one month after proof of the death of the assured. It also contained a recital that the statements contained in the proposal and declaration, together with the statements contained in the personal statements made to Doctors Stokes and Warren already referred to, were the basis of the contract, and were to be deemed to be part thereof and incorporated therewith. It further contained a recital that the appellant society had agreed to accept the proposal of the respondent association. By the operative part of the policy the appellant society contracted that in the event of the death of the assured while the premiums under the policy were duly paid the society would pay to the association the sum of 5000*l.* within one calendar month after such evidence as the board of directors of the appellant society might consider necessary to establish the age, identity, and death of the assured had been supplied to the society. It was provided that under no circumstances should the amount payable by the society exceed that paid by the association under the original policy irrespective of any amount payable thereunder by way of bonus.

Apart from any inference to the contrary to be drawn from the recital that the appellant society had agreed to accept the proposal of the respondent association, it was not, and indeed it could not be, disputed that the liability of the appellant society under the policy of re-insurance was conditional on the

truth of the statements made the basis of the contract. Further, apart from any effect to be attributed to this recital the terms of the policy of re-insurance differ in almost every particular from the terms of the original policy. The basic conditions are different. The premiums are different. The original policy allows, but the policy of re-insurance does not allow, a period of grace for the payment of premiums. The moneys assured differ in amount and are payable at different dates. The persons to determine the sufficiency of the evidence as to the age, identity, and death of the assured are different. The original policy contains a number of special provisions which are not contained in the policy of re-insurance. Everything therefore points to the policy of re-insurance being an independent contract of assurance rather than a contract of indemnity. Even the provision limiting liability under the policy of re-insurance to the amount paid under the original policy would be unnecessary if the contract were one of indemnity only. It is in their Lordships' opinion important to remember all this in considering the effect of the recital last referred to.

It was admitted by the appellant society in the pleadings, and assumed throughout the proceedings in the Courts below and in the arguments before their Lordships' Board, that the effect of this recital was to incorporate in the policy all the terms of the proposal for re-insurance dated January 2, 1908. Their Lordships are not satisfied that the recital has any such effect. The recital may very well mean that the directors of the society have determined to accede to the application of the respondent society for a policy of re-insurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statements contained in the proposal and not the proposal itself. Having regard, however, to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of January 2, 1908.

The document of January 2, 1908, contains the following clause :—"It is understood that in accepting the risk under this re-assurance the Australian Widows' Fund Life Assurance Society,

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Limited," (i.e., the appellant society) "does so on the same terms and conditions as those on which the National Mutual Life Association of Australasia, Limited," (i.e., the respondent association) "have granted a policy and by whom, in the event of claim, the settlement will be made."

Suppose then that this clause had actually been repeated in the policy itself, what would be its effect? As already pointed out, the expressed terms of the policy of re-insurance are in almost every respect different from the terms of the original policy. It would be contrary to all sound canons of construction to reject or modify the expressed terms of the policy in order that it might be made to conform to the general words of the clause in question. That clause would almost necessarily be construed as if it were prefaced with the words "except as herein otherwise provided." It would be only less difficult to maintain that the effect of the clause was to introduce into the policy of re-insurance provisions relating to (*a*) application of surrender value towards payment of premiums in arrear, or (*b*) forfeiture of premiums already paid, if the basic conditions of the contract were not fulfilled, or (*c*) the allowance of days of grace. But it is enough to say that the incorporation in the policy of the clause in question cannot be allowed to contradict the express provisions of the policy. And yet this is in reality exactly what the respondent association contends for and exactly what has been allowed in the High Court of Australia and the Full Court of Victoria. The somewhat ambiguous words "by whom in the event of claim the settlement will be made" are construed as meaning that if the respondent association acting reasonably and in good faith admit, and settle, its own liability under the original policy, the appellant society is bound by that admission and settlement, and is liable under its own independent contract of re-insurance, notwithstanding the fact that, according to the express terms of that contract, no liability has in fact arisen. Sir Samuel Griffith C.J. appears to have been fully aware of the difficulty involved in so construing and giving effect to the words in question, and he endeavours to meet this difficulty in the following way: In his opinion, although the prima facie meaning of the clause which makes the statements which the

jury found to be false the basis of the contract is to make the liability of the appellant society conditional on the truth of those statements, yet this prima facie meaning is controlled by the incorporation in the policy of the clause contained in the document of January 2, 1908. In reality, he says, it is not the truth of the statements which is made the basis of the contract but the fact that the statements were made, so that there is no contradiction of any express term of the contract in giving to the incorporated clause the effect for which the respondent association contends. The policy is no longer an independent contract but a contract of indemnity, in which it would be quite reasonable to insert a provision making any bona fide settlement effected by the respondent association binding on the appellant society. Their Lordships do not dissent from the proposition that if the clause of the policy which defines the basis of the contract could be so construed, the difficulty would be considerably diminished if not altogether obviated. But in their opinion it is impossible to hold that the perfectly clear provision as to the basic conditions, and indeed the whole tenor of the contract, should be so profoundly altered by the terms of a clause which is incorporated by reference, which is in itself ambiguous, and which may have been inserted with a totally different intention, as for example in order to make an agreement between the respondent association and the legal personal representative of the deceased as to the amount due when the liability was undisputed binding on the appellant society, or in order to preclude interference by the appellant society between the respondent society and its own customer.

In their Lordships' opinion, having regard to the facts found by the jury, the appellant society is not and never was liable on the policy of re-insurance, and they will therefore humbly advise His Majesty that the appeal should be allowed, that the orders of the High Court and of the Full Court of Victoria should be discharged, and the judgment of the Chief Justice of Victoria should be restored, and that the respondent association ought to pay the costs of this appeal and the costs in the Courts below.

Solicitors for appellants: *Lee, Ockerby & Everington.*
Solicitors for respondents: *Oliver & Lyall.*

[PRIVY COUNCIL.]

J. C.* 1914 *Feb.* 16, 18, 19, 25, 26, 27; *April* 7.

ARNOLD . . . . . APPELLANT;

AND

THE KING-EMPEROR . . . . . RESPONDENT.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Practice of the Judicial Committee—Criminal Proceedings—Appeal in Criminal Matter.

The practice of the Judicial Committee with regard to appeals in criminal matters as laid down in *Reg.* v. *Joykissen Mookerjee* (1862) 1 Moo. P. C. (N.S.) 272, and in *Falkland Islands Co.* v. *Reg.* (1862) 1 Moo. P. C. (N.S.) 299, has not been altered in any respect by the decisions in *In re Dillet* (1887) 12 App. Cas. 459 and later cases. The Judicial Committee will not interfere with the course of criminal law unless there has been such an infringement of the elementary rights of an accused as has placed him outside the pale of regular law, or unless, within that pale, there has been so manifest a violation of the principles of natural justice that their Lordships are satisfied that both they themselves and, in the absence of the irregularity complained of, the local tribunal would have arrived at a result contrary to that which was come to.

In the present case, *held* that there was no misdirection or improper exclusion of evidence, and that the appeal should be dismissed.

APPEAL, by special leave, from a conviction and sentence by the Chief Court of Lower Burma (October 19, 1912) on a prosecution for defamation under s. 499 of the Indian Penal Code.

The appellant, who was the editor and one of the proprietors of a newspaper called the *Burma Critic*, published at Rangoon, was charged under s. 499 of the Indian Penal Code with having defamed Mr. G. P. Andrew, a member of the Indian Civil Service, the Deputy Commissioner and District Magistrate at Mergui, by the publication in that paper on April 28, 1912, of two articles entitled "A Mockery of British Justice."

The trial took place in October, 1912, before the Chief Judge and a jury. The defence put forward on behalf of the appellant was that he had acted in good faith, as defined by s. 52 of the Indian Penal Code, and for the public good, and that consequently exceptions 1 and 9 to s. 499 afforded him an answer to the charge. The jury, after being directed by the Chief Judge,

* *Present:* LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE, and MR. AMEER ALI.

returned a verdict of guilty, and the appellant was sentenced to one year's simple imprisonment..

The appeal is also reported in the *Law Reports*, Indian Appeals (1), from which report the facts and the arguments of counsel more fully appear.

Sir R. Finlay, K.C., *D. A. Wilson*, and *Arthur Page*, for the appellant, contended that the jury had been misdirected and evidence wrongly excluded, and that the appellant was consequently entitled to have the conviction set aside. They referred to *Makin* v. *Attorney-General for New South Wales* (2), *Reg.* v. *Gibson* (3), *Rex* v. *Dyson* (4), *Rex* v. *Stoddart* (5), *Bray* v. *Ford* (6), *Rex* v. *Norton* (7), *In re Dillet* (8), and *Vaithinatha Pillai* v. *King-Emperor*. (9)

Sir Erle Richards, K.C., and *Dunne*, for the respondent, contended that there had been no misdirection or improper exclusion of evidence, but that even if there had been the case was not one in which, according to the practice of the Board, the conviction should be interfered with. They referred to *Reg.* v. *Joykissen Mookerjee* (10), *Falkland Islands Co.* v. *Reg.* (11), *In re Dillet* (8), *Vaithinatha Pillai* v. *King-Emperor* (9), *Clifford* v. *King-Emperor* (12), *Lanier* v. *Rex* (13), and to *Makin* v. *Attorney-General for New South Wales* (2), which last named, they argued was distinguishable.

The judgment of their Lordships was delivered by

1914
April 7.

LORD SHAW OF DUNFERMLINE. [After dealing at length with the facts of the case and the proceedings at the trial (14), their Lordships' judgment continued as follows :] From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the

(1) L. R. 41 Ind. Ap. 149.
(2) [1894] A. C. 57.
(3) (1887) 18 Q. B. D. 537.
(4) [1908] 2 K. B. 454.
(5) (1909) 25 Times L. R. 612.
(6) [1896] A. C. 44.
(7) [1910] 2 K. B. 496.
(8) 12 App. Cas. 459.
(9) (1913) L. R. 40 Ind. Ap. 193.
(10) 1 Moo. P. C. (N.S.) 272.
(11) 1 Moo. P. C. (N.S.) 299.
(12) (1913) L. R. 40 Ind. Ap. 241.
(13) [1914] A. C. 221.
(14) The judgment appears in full at L. R. 41 Ind. Ap., p. 155.

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determination was on a subject peculiarly within the jury's province. In their Lordships' opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the Empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case, inclines their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, except where such power and authority have been parted with by statute, is undoubted. Upon the other hand there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than fifty years ago by Dr. Lushington in his judgment in *Reg.* v. *Joykissen Mookerjee* (1), and Lord Kingsdown, in the case of *Falkland Islands Co.* v. *Reg.* (2), stated the matter compendiously in these words: "It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such

(1) 1 Moo. P. C. (N.S.) 272. (2) 1 Moo. P. C. (N.S.) 299, at p. 312.

appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success." Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *In re Dillet.* (1) It should be observed that while *Dillet's Case* (1) was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to Lord Kingsdown's judgment in the *Falkland Islands Case* (2) as authoritative and binding. After citing that learned judge, Lord Blackburn added: "In this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of the 27th March, 1885," and liberty accordingly was granted "to appeal against the order of the 27th March, 1885, striking him off the roll, and also to the extent above stated, and no further, against conviction for perjury."

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in *Dillet's Case* (1)

(1) 12 App. Cas. 459.

(2) 1 Moo. P. C. (N.S.) 299, at p. 312.

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observed that "the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or unless, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet's Case* (1) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin* v. *Attorney-General for New South Wales* (2) was cited. *Makin's Case* (2) in truth did not raise the question at issue in the present case. It depended upon the construction of s. 423 of the

(1) 12 App. Cas. 459. (2) [1894] A. C. 57.

Criminal Law Amendment Act of 1883 (a New South Wales statute). That section set up the judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the judges have not been substituted for the jury. As they said, "In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the verdict of the jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence."

The second case founded on is that of *Vaithinatha Pillai* v. *King-Emperor* (1), in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the magistrate and certain officials. "If true," observed Lord Atkinson, "they shew that these officials, or at least the sub-inspector, induced the witness to forswear himself and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they shew that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative." The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's Case* (2) was again reaffirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Lanier* v. *Rex* (3), and,

(1) L. R. 40 Ind. Ap. 193. (2) 12 App. Cas. 459.
(3) [1914] A. C. 221.

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fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime." The Board were of opinion that the sentence pronounced against the appellant "formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's Case* (1) was again cited. It was pointed out that the interference was not on any matter or form, but because of matters lying at the very foundation of justice (the judge had been a judge in his own cause), justice had "gravely and injuriously miscarried." *Lanier's Case* (2) stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is this, that it must be established clearly that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in

(1) 12 App. Cas. 459. (2) [1914] A. C. 221.

advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *King-Emperor* (1) on November 17 last, and their Lordships refer to the judgment of the Lord Chancellor in this and the other refusal referred to.

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The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. A fortiori their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the appeal be dismissed. There will be no order as to costs.

Solicitors for appellant: *Bramall & White.*

Solicitor for respondent: *The Solicitor, India Office.*

[PRIVY COUNCIL.]

CAMERON . . . . . APPELLANT;

AND

CUDDY AND ANOTHER . . . . . RESPONDENTS.

J. C.* 1913 *July* 23; *Aug.* 7.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract—Arbitration Clause—Abortive Arbitration Proceedings—Duty of the Court.

In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive it is the duty of the Court to supply the defect by itself ascertaining the amount due.

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (October 7, 1912) dismissing an appeal from a judgment of the Court of Appeal for British Columbia (November 7, 1911) which affirmed a judgment of the Supreme Court of British Columbia (January 24, 1911).

* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARKER OF WADDINGTON.

(1) L. R. 40 Ind. Ap. 241.

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By an agreement, dated September 21, 1903, the respondents agreed to sell to the appellant the whole of the issued share capital of a timber milling and lumber company incorporated in British Columbia for $150,000. By clause 2 of the agreement the respondents guaranteed that the assets of the company with their approximate values consisted of the lands, tenements, goods and chattels set forth in the schedule. Clause 6 of the agreement provided as follows: "The said parties of the first part" (the respondents) "further guarantee that the balance of the assets of the said company, over and above the logs, stock in store, piles, boom sticks and boom chains, are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of the said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part" (the respondents and appellant respectively), "and a third by the two arbitrators so named as aforesaid, and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement."

The agreement provided that the shares should be transferred at once and that the purchase price should be paid in six instalments of $25,000. The schedule of assets, annexed to the agreement, contained an item: "Timber lands 17,563 acres at 30 M. per acre, 526,890,000 feet at 15 c."

The respondents transferred the shares and the appellant paid some of the instalments due under the agreement. The appellant then contended that there was a deficiency of timber, and the matter was referred to three arbitrators under the terms of clause 6 of the agreement. The arbitrators made a majority award on May 28, 1908, but, upon an application by the appellant to the Court, this award was set aside. The ground for the decision was that in the view of the learned judge the effect of the agreement was that the amount of the deficiency had to be ascertained before the matter was submitted to the arbitrators and that their authority was confined to estimating the value of the deficiency when ascertained.

On December 15, 1909, the time for the payment of all the instalments having expired, the respondents sued the appellant to recover the balance due under the agreement after allowing for certain admitted deficiencies in the assets other than the timber referred to in clause 6. The appellant by his amended statement of defence relied on clauses 2 and 6 of the agreement and alleged that there was a deficiency of 222,477,107 feet in amount of timber. He did not raise a counter-claim.

At the trial the appellant's counsel proposed to call evidence to establish the alleged deficiency of timber, but the evidence was excluded and judgment entered for the respondents for the amount claimed.

The Court of Appeal (Macdonald C.J.A. and Irving J.A., Martin J.A. dissenting), by a judgment delivered on November 7, 1911, affirmed this decision and refused the appellant leave to amend by counterclaiming. The majority of the Court held that the appellant could not establish the value of the deficiency in the absence of an award, and that if he had an independent right under clause 2 he should have proceeded by counter-claim. Martin J.A., in dissenting, was of opinion that the Court should ascertain the amount of the deficiency, leaving its value to be ascertained by arbitrators.

On an appeal to the Supreme Court of Canada, that Court (Fitzpatrick C.J., Idington, Duff, Anglin, and Brodeur JJ.), by a judgment delivered on October 7, 1912, held that the matter was really one of procedure and that the Supreme Court should not interfere with the judgment.

J. S. Ewart, K.C., and *Matthew Wilson, K.C.*, for the appellant. Upon the true construction of the agreement the burden of proving the amount due to the respondents was upon them, and they could only recover the full amount if they could establish that there was no deficiency. If, however, the onus to prove a deficiency was upon the appellant, the Court should have admitted the evidence and ascertained what was the true amount due. Where an arbitration clause has proved ineffective, the Court should itself supply the defect. If a counter-claim was

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necessary the Court of Appeal should have allowed an amendment so as to do justice between the parties.

Buckmaster, K.C., and the *Hon. M. Macnaghten*, for the respondents. Under the contract there was an independent agreement for the payment of the purchase price, and the onus of proving a deficiency was clearly upon the appellant. The effect of the judgment appealed from is not to deprive the appellant of his right in respect of any deficiency which may have existed. The question is one of procedure. The Courts appealed from held that the appellant's claim was not raised in the most convenient way ; their decision should not be interfered with.

J. S. Ewart, K.C., in reply, referred to *Hamlyn & Co.* v. *Talisker Distillery* (1) and *Pena Copper Mines* v. *Rio Tinto Co.* (2)

1913 *Aug. 7.*

The judgment of their Lordships was delivered by

Lord Shaw of Dunfermline. This is an action brought by the respondents, who were vendors of the shares of a certain lumber company. They sue the appellant to recover payment of their purchase-money. Judgment was obtained for the sum of $83,532. This judgment was pronounced in the Supreme Court of British Columbia, and an appeal against it was dismissed by the Court of Appeal for that Province. A further appeal to the Supreme Court of Canada by the appellant also failed.

The action was grounded upon a certain agreement of the parties. That document provided for the payment to be made for the stock transferred being liable to certain deductions. For instance, section 3 provides for an abatement "if upon investigation and examination it turns out that there are less than 6,000,000 feet of logs at Chehalis River." Similar provisions are made by section 4 for the case of a deficiency in regard to goods laid down at the Harrison River. By section 5 the parties agree that the number of piles, &c., in the schedule are correct, but that "if upon investigation and examination there is a deficiency, the amount thereof, estimated at the value of the piles, shall be deducted from the purchase money still owing and unpaid." It was explained at the Bar that under these three sections, namely,

(1) [1894] A. C. 202, at p. 211. (2) (1911) 105 L. T. (N.S.) 846.

3, 4, and 5, of the agreement, deficiencies had been discovered to exist, that the allowance between the parties had been arranged, and that deductions from the purchase price had been made.

The scheme of the contract appears to have been that a scheduled statement of maximum contents and prices was made, and an arrangement for deductions and for the striking of the true balance which would be the true price.

The present deduction, which is the subject of dispute, is made under section 6 of the agreement, which is in these terms: "The said parties of the first part further guarantee that the balance of the assets of the said company over and above the logs, stock in store, piles, boom sticks and boom chains, are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of the said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part, and a third by the two arbitrators so named as aforesaid, and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement." This section is also in complete accord with the general scheme of the bargain as above set forth.

In the working out of this clause 6, something in the nature of a real misadventure has occurred. An actual deficiency is admitted to exist, yet a decree stands against the appellant as if it did not. An order has been pronounced that he shall pay the full sum without deduction, and that notwithstanding his contractual right to have a deduction made. He accordingly stands due to pay money which it is admitted on all hands that he does not owe, and he is left to take recourse in further litigation so as to retrieve the amount of overpayment.

This mischance occurred in this way. A claim in respect of the deficiency having been made, that claim was submitted to the judgment of three arbitrators in terms of clause 6 of the agreement. Unhappily the arbitrators could not agree and made a majority award. The Court, the contract being in the terms quoted, and for reasons which need not be entered upon, declined

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to give effect to the award. In these circumstances, when the respondents sued for their purchase price, the appellant asked the Court itself to fix the value of the deficiency, and in terms of section 6 of the bargain to deduct it from the price due. This claim for deduction was not admitted to probation and was not given effect to. In their Lordships' opinion it was a proper claim, and was properly stated by way of defence.

When an arbitration for any reason becomes abortive, it is the duty of a Court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* (1) might be referred to.

By section 6 of this agreement the appellant had a contractual right to insist on a deduction equal to the value of the deficiency of assets delivered, such value being determined by arbitration. When the arbitration became abortive, that method of fixing the value became, of course, impossible. But by the well-recognized principle which has just been cited, the Court in such a case must take upon itself the burden of deciding that which the parties had intended originally should be decided by a domestic tribunal.

It follows, therefore, that section 6 must be read as though the provision that the value should be decided by arbitration dropped out. The clause accordingly would be a simple and plain provision that "the value of said deficiency shall be . . . . deducted from the said purchase money." The appellant properly took his defence according to these principles. In the sixth paragraph, head E thereof, he founds upon the agreement, and says that, according to the terms of clause 6 of it, the plaintiffs guarantee

(1) [1894] A. C. 202.

that the balance of the assets, &c., truly appeared in the schedule, and that "if upon investigation and examination it turned out that the said assets or any of them were not forthcoming and could not be delivered, the value of the said deficiency should be deducted from the said purchase money still owing and unpaid under the agreement; and upon investigation and examination it did turn out that there was a great deficiency in the amount of the timber set forth in the said schedule." Their Lordships are of opinion that the appellant ought to have been allowed to prove this case in defence, and that the refusal to permit him to do so by the trial judge—a refusal supported in the other Courts in Canada—was erroneous.

The view upon which the Courts below proceeded is succinctly expressed in the judgment of Irving J., who says: "The plain meaning of section 6 of the agreement is that there is to be an arbitration to decide what deduction is to be made, and unless and until such deduction is ascertained in the way specified in paragraph 6, the defendant has no available defence."

Their Lordships entirely differ from such opinion. The deduction cannot be ascertained, not on account of any fault of the appellant, but because the machinery for arbitration, which was duly and properly invoked by him, broke down. The law could not permit that he should have to make payment in respect of assets which it is admitted he did not receive because the apparatus for fixing the value of the deficiency had in this way failed. Such procedure does not appear to be in accordance with sound principle.

Two learned judges in the Supreme Court recognized very clearly the nature of the difficulty. In the judgment of Anglin J., concurred in by the learned Chief Justice of the Supreme Court, the opinion is expressed that it would have been more satisfactory and more in accord with the true rights of the parties if "the defendant would not be compelled to pay to the plaintiffs the entire price of the share purchased, although entitled in a proper proceeding to recover from them a substantial sum in respect of the deficiency in the timber on the limits sold. That there is such a deficiency is admitted."

The Supreme Court was, however, reluctant to interfere with

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the judgment of the Court of Appeal, looking upon the question as largely one of procedure. But, in their Lordships' view, it was much more. It was a question which went in principle to the incapacity of a Court of law to effectuate justice, by itself undertaking a duty to supply a defect which had occurred in the prescribed mode of ascertaining the rights of parties. It is further quite plain that when there is an admission of deficiency in assets delivered, it could be only in the most exceptional case that a judgment for the full value, and ignoring that deficiency, could be allowed to stand.

Their Lordships will humbly advise His Majesty that the appeal be allowed, and that the judgment of the trial judge, including his order disallowing evidence as above mentioned, and all the judgments of the Courts since that date, should be reversed, so that the trial may proceed, the value of the deficiency be ascertained, and judgment be given for the balance (if any) remaining after the deduction in respect of undelivered assets has been made. The appellant will have his costs of the cause here and in the Courts below, except those incurred up to the date of trial which can be made still available in the cause.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Armitage, Chapple & Macnaghten.*

[PRIVY COUNCIL.]

LEVINE . . . . . APPELLANT;

AND

SERLING . . . . . RESPONDENT.

J. C.*
1914
May 11, 12, 21.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Procedure in Quebec—Action against Minor—Nullity of Proceedings—Quebec Code of Civil Procedure, s. 78.

An action brought against a minor in the Province of Quebec is an absolute nullity under the Code of Civil Procedure of that Province, and cannot be proceeded with upon the minor attaining his majority.

APPEAL, by special leave in forma pauperis, from a judgment of the Supreme Court of Canada (October 7, 1912) reversing the judgment of the Court of King's Bench (Appeal side) of the Province of Quebec (December 30, 1911), which reversed the judgment of the Superior Court at the trial, and two interlocutory judgments of that Court.

The questions raised in the appeal were whether by the law of Quebec a minor can validly be sued in his own name, and whether proceedings so commenced can be continued to judgment after he has attained his majority.

On November 4, 1908, the respondent brought an action in the Superior Court of the Province of Quebec, claiming damages for tort against the appellant. The appellant appeared, and on February 1, 1909, he pleaded minority by way of an exception to the form, as provided by art. 174 of the Code of Civil Procedure of Quebec. The respondent filed an answer denying that the appellant was a minor, and issue having been joined upon this answer the appellant proved that he was a minor.

The respondent thereupon moved the Court to call a family council of the appellant's relatives and friends in order to appoint a tutor to the appellant; a family council was summoned but did not meet, and no tutor was ever appointed.

The appellant became of age on July 2, 1909, and in

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD MOULTON, LORD PARKER OF WADDINGTON, LORD SUMNER, and SIR GEORGE FARWELL

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September, 1909, the respondent petitioned the Superior Court, under art. 167 of the Code of Civil Procedure, for a declaration that the appellant was properly joined, and that he be ordered to plead to the claim. Lafontaine J. made an order as prayed, and an appeal by the appellant to the Court of Review was dismissed on the ground that that Court had no jurisdiction.

On January 7, 1910, the respondent inscribed the case for judgment ex parte, and the appellant was subsequently compelled to appear and give evidence under pain of imprisonment for contempt of Court. On June 30, 1910, however, the inscription for judgment was dismissed as premature as the appellant's exception to the form had not been disposed of. On October 28, 1910, Charbonneau J. dismissed the appellant's exception to the form on the ground that the appellant had then attained his majority, and the case was again inscribed for hearing.

On January 21, 1911, no plea to the merits having been entered by the appellant, the action came on for hearing ex parte before Demers J., who gave judgment in favour of the plaintiff (respondent) for $2000.

The appellant appealed to the Court of King's Bench (Appeal side) against this judgment, also against the interlocutory judgments of Lafontaine J. and Charbonneau J. above referred to. That Court (Archambeault C.J., Trenholme, Lavergne, Carroll, and Gervais JJ.) set aside the judgments appealed from, maintained the appellant's exception to the form, and dismissed the action. The learned judges were unanimously of opinion that minority was an absolute bar to the action, and that no person could be made a party to an action, whether as plaintiff or defendant, unless, as provided by art. 78 of the Code of Civil Procedure, he had the full exercise of his rights.

The respondent appealed to the Supreme Court of Canada, and that Court on October 7, 1912, by a majority of three to two allowed the appeal.

Brodeur J., with whose judgment Idington J. and Duff J. agreed, held that art. 174 of the Code of Civil Procedure shewed that an exception to the form can only succeed if it is proved that the party excepting is prejudiced, and that the present appellant was not prejudiced. He was of opinion that the incapacity of minors

is relative and not absolute, and that, although art. 384 of the Civil Code and art. 78 of the Code of Civil Procedure preclude a minor, save in certain cases, from bringing an action, there was nothing in the Code which declared that a writ of summons (assignation) against a minor was a nullity. He also considered that the appellant by giving evidence when of age had acquiesced in being treated as a defendant in the cause.

The learned Chief Justice (with whose judgment Anglin J. agreed) dissented, holding that minority is an absolute bar, and, even when not set up, can be invoked after judgment on a petition in revocation. He was of opinion that when minority was set up the proper course for the plaintiff was to take steps to have a tutor appointed, who could be brought into the case by a new writ. He cited authorities to the effect that whenever there is a nullity there is a prejudice, and, while holding that there had been no acquiescence, referred to Demolombe's dictum "on ne conforme pas le néant."

Geoffrey Lawrence and *P. Ledieu*, for the appellant. An action brought against a minor in his own name in Quebec is a nullity. Art. 78 of the Code of Civil Procedure provides that no person can be a party to an action, either as claimant or defendant, or in any form whatever, unless he has the free exercise of his rights, saving where special provisions apply. [Arts. 80 and 81 were also referred to.] The Civil Code shews that a minor has not the free exercise of his rights. [Arts. 246, 249, 250, 290, 304, 324, and 987 of the Civil Code were referred to.] An action improperly commenced against a minor cannot be continued against him upon his attaining his majority; this is indicated by art. 270 of the Code of Civil Procedure. Further, under art. 120 of that Code the validity of the writ expired, if it ever had any, before the appellant was of age. The appellant by entering an exception to the form followed the practice prescribed by art. 174 of that Code; that course is the equivalent to the entry of an appearance under protest in the English procedure. There was no acquiescence by the appellant at any stage of the proceedings, but since they were a nullity it is immaterial whether there was or not.

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R. C. Smith, K.C., and *G. Williamson*, for the respondent. The object of the revised Code of Civil Procedure was to do away with technicality in procedure. Art. 174 differs from the corresponding article which it replaced in providing that an exception to the form can be invoked only where the ground causes a prejudice to the party. Whether or not a prejudice is caused is a question which the Court in which the action is brought has a discretion to decide. Having regard to the fact that the appellant had come of age and to the fact that a tutor could have been appointed if the appellant had convened the family council, there was no prejudice in the present case. The service of a writ of summons upon a minor cannot be treated as a nullity. [Arts. 513 and 516 of the Code of Civil Procedure were referred to.]

1914
May 21.

The judgment of their Lordships was delivered by

SIR GEORGE FARWELL. This is an appeal from the judgment of the Supreme Court of Canada, who by a majority of three to two have reversed the unanimous decision of the Court of King's Bench for Quebec.

The respondent on November 4, 1908, issued his writ in an action for damages for tort against the appellant, and the appellant duly pleaded that he was a minor, and issue having been joined thereon established the plea. On May 5, 1909, the time for service of the writ expired (art. 120), and on July 2, 1909, the appellant attained his majority. Ineffectual efforts were made by the respondent during the appellant's minority to obtain the appointment of a tutor to the appellant, and on September 27, 1909, Lafontaine J. made an order on the respondent's motion that the defendant be declared to be properly joined to the action and ordered to plead within the regular time on the ground that the appellant had had notice of the application and made default in appearance, and that there was reason to believe that the exception of infancy was made to delay the proceedings, and on January 21, 1911, final judgment was entered ex parte against the appellant condemning him to pay $2000 for malicious arrest.

Their Lordships are in accord with the dissenting judgment of the Chief Justice in the Supreme Court. Minority is an absolute bar to an action.

The Code of Civil Procedure provides, art. 78: "No person can be a party to an action, either as claimant or defendant, in any form whatever, unless he has the free exercise of his rights, saving where special provisions apply. Those who have not the free exercise of their rights must be represented, assisted, or authorised in the manner prescribed by the laws which regulate their particular status or capacity."

Every action is commenced by writ of summons, which remains in force while unserved for six months from its date (art. 120). Service must be made either on the defendant in person or at his domicil, or at the place of his ordinary residence, speaking to a reasonable person belonging to the family (art. 128). The defendant when summoned must file an appearance (art. 161). It is clear from these articles that a minor sued and served as a defendant is not in truth thereby made a party at all. There is an absolute bar to the right to sue him in his own name. He is by art. 174 enabled to take exception to any action in which he is named as defendant, notwithstanding that he is not in law capable of being one, and by art. 1177 he can obtain revocation of a judgment pronounced against him if no defence or no valid defence has been made on his behalf.

In the case before their Lordships there was no properly constituted action against the appellant at any time; while he was a minor there was no service on any person capable of being served; before he attained his majority the time for serving the writ had run out and there was no action any longer existing even in an inchoate state. Their Lordships are, with great respect for the majority of the Supreme Court, unable to concur in the reasoning of Brodeur J. They do not agree with the statement that the incapacity of minors is relative and not absolute; in their opinion the incapacity to sue and be sued is absolute, subject only to certain expressed exceptions. Nor do they altogether agree with the statement that the Code has nowhere declared that *l'assignation* or summons to appear before the Court of a minor is null; if the minor is named as a defendant and excepts on the ground of his infancy and issue is joined on that issue the Court can, of course, summon the defendant who so takes exception to their jurisdiction to appear

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and support it, but by so appearing he does not affect the generality of the veto in art. 78: that veto depends on an issue of fact, and the Court must necessarily have the parties raising the issue in Court before the point can be properly determined. But when it has once been established, as in this case, that the so-called defendant is an infant, then he ceases ab initio to be a defendant and cannot be treated by summons or order as if he were: this is not a mere question of procedure but of legal right, and is therefore not a matter of judicial discretion but of determination on the facts. The proceedings after the infant attained his majority in this case are open to the further objection that there was then no longer any action in existence.

Their Lordships will therefore humbly advise His Majesty to allow this appeal with such costs as the appellant is entitled to have appealing in forma pauperis. The respondent must pay all the costs of the proceedings in the Courts below.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

LEVINE . . . . . APPELLANT;

AND

SERLING . . . . . RESPONDENT.

J. C.*
1914
July 23.

(No. 2.)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Costs—Taxation—Appeal in forma pauperis — Costs of Petition for Special Leave.

An order of the Judicial Committee giving special leave to appeal in forma pauperis takes effect from the date upon which it is made, and has no effect upon costs incurred before that date. A successful appellant in forma pauperis is consequently entitled to recover the costs of the petition for special leave to appeal upon the ordinary scale as between party and party.

PETITION by the respondent to the above appeal in the matter of the taxation of the costs of the appeal.

The appellant obtained by petition to the Judicial Committee special leave to appeal from a judgment of the Supreme Court of Canada. The appeal was subsequently heard and an order made allowing the appeal "with such costs as the appellant is entitled to have appealing in forma pauperis." (1)

The appellant having brought in a bill of costs in which the items in connection with the petition for special leave were charged upon the ordinary party and party scale, the respondent petitioned the Judicial Committee that the items in question should be directed to be taxed according to the scale applicable to proceedings in forma pauperis.

H. O. Danckwerts, for the petitioner (respondent in the appeal). The appellant is only entitled to recover the costs of the petition

* *Present:* VISCOUNT HALDANE L.C., LORD MOULTON, and LORD SUMNER.

(1) Ante, p. 664.

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for special leave upon the pauper scale. The point is not determined by the rules of the Judicial Committee relating to appeals in forma pauperis: Judicial Committee Rules, 1908, rr. 8, 9, 10, and 81. In *Wasteneys* v. *Wasteneys* (1), however, the Board adopted the rule which prevails in the House of Lords as to the costs recoverable by a pauper appellant. According to that practice, which differs from the practice under Rules of the Supreme Court, the appellant is only entitled to the costs in question upon the pauper scale: Standing Order of the House of Lords II. (Annual Practice, 1914, pp. 2291 and 2314); Directions for Agents, No. 16 (Annual Practice, p. 2297). In the High Court the order giving leave does not affect costs previously incurred: Rules of the Supreme Court, Order XVI., rr. 22—31; *Carson* v. *Pickersgill.* (2) [*Ex parte Walker* (3) was also referred to.]

Geoffrey Lawrence, for the respondent (appellant in the appeal). The practice of the Judicial Committee is well established that the order giving special leave to appeal in forma pauperis takes effect only from the date when it is made: *Pollard* v. *Harragin* (4); *McLeod* v. *St. Aubyn.* (5) The rule is a fair and equitable one. The circumstances in *Wasteneys* v. *Wasteneys* (1) are distinguishable, as in that case it does not appear whether there were any costs of the petition for special leave, and the appellant had apparently appealed in forma pauperis to the Court below. [*In re Raphael* (6) was also referred to.]

1914 *July* 23.

The judgment of their Lordships was delivered by

LORD MOULTON. Their Lordships have examined the authorities as to the practice of this Board with regard to the date from which an order for leave to appeal in forma pauperis takes effect, and they are clearly of opinion that the settled practice is the same as that of the High Court, namely, that the order takes effect only from the date at which it is made, and has no effect whatever on costs incurred before that date.

The application, therefore, that the costs of the petition for

(1) [1900] A. C. 446, at p. 451.
(2) (1885) 14 Q. B. D. 859.
(3) [1903] A. C. 170.
(4) [1891] A. C. 450, at p. 454.
(5) [1899] A. C. 549, at p. 562.
(6) [1899] 1 Ch. 853.

special leave to appeal in forma pauperis may be taxed upon the pauper scale must be dismissed, but there will be no costs of the application.

J. C. 1914 LEVINE v. SERLING.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

BOARD OF MANAGEMENT OF TRIM JOINT DISTRICT SCHOOL . . . . . } APPELLANTS;

AND

KELLY . . . . . RESPONDENT.

H. L. (I.)* 1914 *April* 6.

Employer and Workman—Compensation—Accident—Premeditated Assault—"Arising out of and in course of the employment"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An assistant master at an industrial school, whilst engaged in the performance of his duties, was assaulted by two of the pupils in pursuance of a preconcerted plan of attack and killed. A dependant of the deceased claimed compensation from the managers of the school. The county court judge found that some of the boys were unruly and badly disposed and that the deceased met his death by accident arising out of and in the course of his employment:—

Held (by Viscount Haldane L.C., Earl Loreburn, Lord Shaw of Dunfermline, and Lord Reading; Lord Dunedin, Lord Atkinson, and Lord Parker of Waddington dissenting)—(1.) that the death was caused by accident; (2.) that there was evidence to support the finding of the arbitrator that the accident arose out of the employment.

Dictum of Lord Macnaghten in *Fenton* v. *Thorley & Co.* [1903] A. C. 443, at p. 448, explained.

Anderson v. *Balfour* [1910] 2 I. R. 497 and *Nisbet* v. *Rayne* [1910] 2 K. B. 689 approved.

Murray v. *Denholm & Co.*, 1911 S. C. 1087, overruled

Decision of the Court of Appeal in Ireland affirmed.

APPEAL from an order of the Court of Appeal in Ireland affirming an award of the county court judge of Meath made under the Workmen's Compensation Act.

* *Present:* VISCOUNT HALDANE L.C., EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD READING.

H. L. (I.)
1914
TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT v. KELLY.

The respondent claimed compensation from the appellants as sole dependant in respect of the death of her son John Kelly.

Kelly was employed by the appellants as an assistant master in the Trim School, which was established as a school for training children of the Meath and other union workhouses under fifteen years of age in industrial pursuits.

It was part of his duties to superintend the boys in the school and in the playground.

The boys were angry with Kelly because he had stopped them playing hurley, or hockey, in the school yard and because he had caught one of them stealing, and they planned an attack upon him.

On the evening of February 12, 1912, the boys collected in a shed adjoining the school, armed with hurley sticks, brooms, and scrubs—a scrub being a heavy block of wood attached to a broom handle. Kelly came down from the school, walked along the shed and turned to come back, when one of the boys struck him twice on the head with a scrub and another boy struck him with a broom.

Kelly's skull was fractured and he died on the same day.

During a period of twenty-two years there had been two previous assaults on masters by individual boys, but no previous case of conspiracy.

The county court judge found that a certain number of the boys were unruly, vicious, and badly disposed. He was of opinion that the occurrence was an accident within the meaning of the Act and he further found that the accident arose out of and in the course of the deceased's employment. He accordingly made an award in favour of the respondent for 100*l.*

The Court of Appeal (the Lord Chancellor and Holmes and Cherry L.JJ.) affirmed the award of the county court judge.

This appeal was twice argued: first (before Earl Loreburn, Lord Dunedin, Lord Atkinson, and Lord Shaw of Dunfermline) on November 24 and 25, 1913, and, secondly, on February 23 and 24, 1914.

Sankey, K.C., and *Ernest F. Lever*, for the appellants. 1. The injury sustained by the deceased was not an "injury by accident" within the meaning of the Workmen's Compensation Act.

The language of this Act is to be interpreted in its ordinary and popular meaning: *Brintons* v. *Turvey* (1); *Ismay, Imrie & Co.* v. *Williamson* (2); but nobody out of a Court of law would describe an injury which resulted from a deliberately planned assault as the result of an accident. The outcome of a deliberate design to injure cannot be an accident. In *Fenton* v. *Thorley* (3) Lord Macnaghten says that the expression "accident" is used in the Act in the popular and ordinary sense of the word as denoting "an unlooked-for mishap or an untoward event which is not expected or designed," and Lord Lindley defines "accident" as meaning "any unintended and unexpected occurrence which produces hurt or loss." Upon the question whether a deliberate criminal act of violence can be an accident the authorities are conflicting. One view has been taken in England and in Ireland and another in Scotland. In *Anderson* v. *Balfour* (4) a gamekeeper whilst engaged in the discharge of his duties was attacked and beaten by poachers. It was held by the Court of Appeal in Ireland (Walker L.C. and Holmes L.J., Cherry L.J. dissenting) that this was an injury by accident within the Act. But the cases cited by the Lord Chancellor do not support the view that an accident may result from a design to injure, and the decision of the majority is opposed to the principles laid down by Lord Macnaghten. In *Nisbet* v. *Rayne* (5), where a cashier, who was travelling for his employers in charge of a large sum of money, was robbed and murdered, it was held by the Court of Appeal in England that the murder was an accident. But both Farwell and Kennedy L.JJ. were forced to admit that this occurrence could not be honestly described as an accident in ordinary parlance. Kennedy L.J., however, conceived it to be his duty to stretch the meaning of the word in accordance with the supposed intention of the Legislature. But the words "by accident" are a limitation upon the words "personal injury" and the Act contains no indication of an intention to render the employer liable for all injuries sustained by his employees. A crime, which is an offence against the State, ought not to

(1) [1905] A. C. 230.
(2) [1908] A. C. 437.
(3) [1903] A. C. 443.
(4) [1910] 2 I. R. 497.
(5) [1910] 2 K. B. 689.

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increase the burden on the industry. *Challis* v. *London and South Western Ry. Co.* (1), which was relied on in both those cases, is distinguishable, as was admitted by Kennedy L.J., because there was there no design to injure. In *Murray* v. *Denholm & Co.* (2), on the other hand, where one of a party of workmen employed to take the place of some men on strike was attacked by the strikers and injured, the Second Division of the Court of Session in Scotland held that this was not a case of injury by accident. The appellants rely on that decision and particularly on the opinion of Lord Dundas. In *Blake* v. *Head* (3), where a boy was attacked with a hatchet by his employer in a fit of anger, the Court of Appeal in England held that this was not an accident inasmuch as it was a felonious act. But in *Mitchinson* v. *Day Brothers* (4), where a carter, who was standing by his horse, was hit by a drunken man and killed, the Court considered itself bound by *Nisbet* v. *Rayne* (5) to hold that this was an accident, but held that it did not arise out of the deceased's employment. Looking at the matter apart from authority, it is a startling thing to say that murder is or could be an accident in the ordinary and popular sense of the word.

2. Assuming that this occurrence was an accident, it did not arise out of the deceased's employment. The test is, was the risk one which was reasonably incidental to the employment?—*Barnes* v. *Nunnery Colliery Co.* (6); *Collins* v. *Collins.* (7) Upon this point *Anderson* v. *Balfour* (8) and *Nisbet* v. *Rayne* (5) are distinguishable because in both those cases the nature of the employment was such as would be likely to expose the employee to the danger of assault from the criminal classes. It is not a risk incidental to the employment of a schoolmaster that his pupils should enter into a conspiracy to assault him.

Ronan, K.C. (of the Irish and also of the English Bar), and *Gerald Horan* (of the Irish Bar), for the respondent. 1. On the question whether this occurrence was an accident it is not true to say that a felony cannot be an accident. If a

(1) [1905] 2 K. B. 154.
(2) 1911 S. C. 1087.
(3) (1912) 5 B. W. C. C. 303.
(4) [1913] 1 K. B. 603.
(5) [1910] 2 K. B. 689.
(6) [1912] A. C. 44, at p. 47.
(7) [1907] 2 I. R. 104, at p. 108.
(8) [1910] 2 I. R. 497.

signalman were drunk at his post and as a consequence a train were wrecked he would be guilty of manslaughter, which is a felony, but it could not be doubted that there was an accident. Then it is said that accident excludes design. But if an act is intentional the amount of deliberation which goes to the formation of that intention is immaterial. There is a distinction between intentional and unintentional acts, but none between intentional and designed acts. Nor does the fact of conspiracy affect the question, for conspiracy means no more than the intention of two or more persons. Therefore the question is whether an injury caused by an intentional act is as a matter of law incapable of being an accident. Lord Campbell's Act, which is in pari materia with the Workmen's Compensation Act, throws some light upon this matter. It is intituled "An Act for Compensation of the Families of Persons killed by Accidents" (and the title of an Act is part of the Act itself: *Fielding* v. *Morley Corporation* (1); *Fenton* v. *Thorley* (2)) and it includes death caused by "wrongful act, neglect or default." Then s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act says that, when the injury is caused by the personal negligence or wilful act of the employer (which is equivalent to the wrongful act or default mentioned in Lord Campbell's Act), or of those for whom the employer is responsible, the workman may at his option claim compensation under the Act or take proceedings independently of the Act, thus shewing conclusively that compensation may be recovered under the Act for injuries caused by wilful or intentional acts. In *Fenton* v. *Thorley* (3) Lord Macnaghten was not intending to give an exclusive definition of the word "accident" but was endeavouring to enlarge the scope of the word by eliminating from it the word "fortuitous," as it had been interpreted by the Court of Appeal, and in *Clover, Clayton & Co.* v. *Hughes* (4) he expressly disclaimed any intention of hazarding a definition of accident. Further, in *Fenton* v. *Thorley* (3) no question of design was before the House, and Lord Shand in paraphrasing Lord Macnaghten leaves out the word "undesigned" altogether. It has never been laid down by this House that a designed or intended act

(1) [1899] 1 Ch. 1.
(2) [1903] A. C. 443, at p. 447.
(3) [1903] A. C. 443.
(4) [1910] A. C. 242.

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cannot be an accident, and that was not Lord Macnaghten's intention. But if that was not his intention the whole foundation of the decision in *Murray* v. *Denholm & Co.* (1) and of the dissentient judgment of Cherry L.J. in *Anderson* v. *Balfour* (2) is gone. That a wilful or intentional act may be an accident within the meaning of the Act is shewn by *Challis* v. *London and South Western Ry. Co.* (3), which was rightly considered by the majority of the Court of Appeal in Ireland as governing their decision in *Anderson* v. *Balfour*. (2) *Blake* v. *Head* (4) is not fully reported and was decided on the ground that the injury did not arise out of the employment. Moreover two of the judges who took part in that decision—Cozens-Hardy M.R. and Buckley L.J.—were also parties to the decision in *Mitchinson* v. *Day Brothers* (5), where the Master of the Rolls, in disposing of the argument that the act was wilful and felonious, said that the Court had held in several cases that there might be an accident although it was due to an intentional act on the part of the felon.

2. On the question whether the accident arose out of the employment this House will not review the findings of the county court judge, apart from the question of error in law, unless there is no evidence to support his findings. In considering this question the character of the school and the class of boy must be taken into account. The boys came from the workhouses and many of them were turbulent and unruly. The injury to the deceased was caused while he was discharging his duty and because he was discharging his duty and by the persons whom it was his duty to control. This is a typical case of injury arising out of the employment and it can be disposed of on the language of the Act itself without any gloss.

Sankey, K.C., in reply. Lord Campbell's Act was intended simply to put an end to the maxim "actio personalis moritur cum persona" as regards fatal accidents and it does not assist the interpretation of the Workmen's Compensation Act.

[The following cases were also referred to: *Andrew* v. *Fails-*

(1) 1911 S. C. 1087.
(2) [1910] 2 I. R. 497.
(3) [1905] 2 K. B. 154.
(4) 5 B. W. C. C. 303.
(5) [1913] 1 K. B. 603.

worth Industrial Society (1); *Kelly* v. *Kerry County Council* (2); *Craske* v. *Wigan* (3); *Pope* v. *Hill's Plymouth Co.* (4); *Eke* v. *Hart-Dyke* (5); *Martin* v. *Manchester Corporation* (6); *Drylie* v. *Alloa Coal Co.* (7); *Potts* v. *Niddrie and Benhar Coal Co.* (8); *Plumb* v. *Cobden Flour Mills Co.* (9)]

The House took time for consideration.

April 6. VISCOUNT HALDANE L.C. My Lords, this appeal raises a question of considerable importance as to the interpretation of the expression "accident arising out of and in the course of the employment" in the Workmen's Compensation Act, 1906.

The circumstances in which the question has arisen are shortly as follows. The respondent is the mother of one John Kelly, who was an assistant teacher in the industrial school at Trim, and whose death was caused by injury sustained by him while superintending the scholars under his charge. It is not in dispute that the respondent was partially dependent on her son, or that if she was entitled to compensation for his death the amount awarded, 100*l.*, was a proper amount.

The proceedings out of which the appeal arises were taken under the Act referred to, and assumed the form of an application for arbitration, which was heard by the county court judge in the county of Meath.

The deceased, John Kelly, who was employed by the appellants, was on February 12, 1912, superintending the boys in the school at exercise in the school yard when he was assaulted by several of them, and was struck with heavy wooden mallets. He died as the result of his injuries. The assault was premeditated and the outcome of a conspiracy among some of the boys to injure Kelly, who had punished or threatened to punish them, and who on the occasion in question was remonstrating with them.

The learned county court judge found that the occurrence was

(1) [1904] 2 K. B. 32.
(2) (1908) 1 B. W. C. C. 194.
(3) [1909] 2 K. B. 635.
(4) (1910) 3 B. W. C. C. 339.
(5) [1910] 2 K. B. 677.
(6) (1912) 5 B. W. C. C. 259.
(7) 1913 S. C. 549.
(8) [1913] A. C. 531.
(9) Ante, p. 62.

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unforeseen, so far as the deceased was concerned, and that when he was assaulted he was doing his duty in remonstrating with the boys who had disobeyed him, and, further, that in what he did he was acting within the scope of his authority, and in the course of his employment. There had been at least two previous assaults of a less serious kind on masters in this school, and the learned county court judge came to the conclusion that some of the boys were unruly and badly disposed, so that, although what Kelly did was his duty as a master, it was attended with a certain risk. He held that what had happened to Kelly was an accident within the meaning of the Act, and that it arose out of and in the course of his employment. He awarded 100*l.* as compensation.

My Lords, it will be observed that the county court judge in making this award was, in accordance with the procedure which the Act prescribes, acting as an arbitrator. His award can therefore be set aside only if it is apparent that there was no evidence to support it, or if error in law appears on the face of it. If he has taken a wrong view of what the Act of Parliament means by "accident" this would be an error in law so apparent. But if he was right on this point, then, as the result of an examination of the oral evidence on which he proceeded, I am of opinion that it would be wrong to interfere with his finding that the accident arose out of and in the course of the employment. The real question in the case is therefore what the expression "accident" signifies in this statute.

Before alluding to the authorities on the point, and to what the Court of Appeal in Ireland decided, I wish to look at this question as if it were a new one. It seems to me important to bear in mind that "accident" is a word the meaning of which may vary according as the context varies. In criminal jurisprudence crime and accident are sharply divided by the presence or absence of mens rea. But in contracts such as those of marine insurance and of carriage by sea this is not so. In such cases the maxim "In jure non remota causa sed proxima spectatur" is applied. I need only refer your Lordships to what was laid down by Lord Herschell and Lord Bramwell when overruling the notion that a peril or an accident in such cases is what must

happen without the fault of anybody in *Wilson* v. *Owners of the Cargo per the Xantho.* (1)

It is therefore necessary, in endeavouring to arrive at what is meant by "accident," to consider the context in which the word is introduced. The scope and purpose of that context may make the whole difference.

I turn, therefore, to the statute under consideration. Its purpose, as indicated in the title, is "to consolidate and amend the law with respect to compensation to workmen for injuries suffered in the course of their employment." Its principle, as enacted in s. 1, is to impose on the employer a general liability to pay compensation in case of personal injury by accident arising out of and in the course of the employment when caused to a workman. A distinction is drawn between the right to this compensation and the liability of the employer for injury caused by negligence. The two rights subsist together, but the workman must elect which he will enforce. The procedure is different—a statutory arbitration in the former case and an ordinary action at law in the latter. If the injury is attributable to the serious and wilful misconduct of the workman he cannot, in ordinary cases, claim compensation, but if death or serious and permanent disablement results compensation can be claimed. An approved scheme for compensation, benefit, or insurance, which may be in part contributory so far as the workman is concerned, can, with the approval of the Registrar of Friendly Societies, and with the consent of the workman, be substituted for the scheme of the Act. Disablement or death occasioned by certain industrial diseases is put on the same footing as personal injury by accident as regards the right to compensation.

My Lords, if we had to consider the principle of the Workmen's Compensation Act as res integra, I should be of opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out and in the course of his employment than to the imposition on the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. I think that the fundamental conception

(1) (1887) 12 App. Cas. 503.

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is that of insurance in the true sense. And if so it appears to me to follow that in giving a meaning to "accident" in its context in such a scheme one would look naturally to the proxima causa, of which Lord Herschell and Lord Bramwell spoke in connection with marine insurance, the kind of event which is unlooked for and sudden, and causes personal injury, and is limited only by this, that it must arise out of and in the course of the employment. Behind this event it appears to me that the purpose of the statute renders it irrelevant to search for explanations or remoter causes, provided the circumstances bring it within the definition. No doubt the analogy of the insurance cases must not, as Lord Lindley points out in his judgment in *Fenton* v. *Thorley* (1), be applied so as to exclude from the cause of injury the accident that really caused it, merely because an intermediate condition of the injury—in that case a rupture arising from an effort voluntarily made to move a defective machine—has intervened. If, so far as the workman is concerned, unexpected misfortune happens and injury is caused he is to be indemnified. The important limitation which the statute seems to me to impose in the interest of the employer, who cannot escape from being a statutory insurer, is that the risk should have arisen out of and in the course of the employment.

It was, however, argued for the appellants that the definition of what accident means in this Act was determined differently by the judgments in this House in the case of *Fenton* v. *Thorley* (1), to which I have just referred. But the House was not there considering an injury unexpected by the workman but caused by the intentional act of another person. Nor do I think that the expressions used in the judgments exclude such a case from the definition actually given of accident. After saying that the element of haphazard is not necessarily involved in the word "accidental," Lord Macnaghten defines "accident" as used in the Act "in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." I think that the context shews that in using the word "designed" he was referring to designed by the sufferer. Nor does the judgment of Lord Lindley, when

(1) [1903] A. C. 443.

closely considered, appear to me to support the arguments for the appellants. What Lord Lindley was considering was a case of injury caused by a rupture due to unusual effort occasioned by unexpected difficulty in moving a wheel due to an accident to the machine. It was argued that the proxima causa was the unusual effort voluntarily put forth. But Lord Lindley was, as I have already said, of opinion that the personal injury was the rupture, and that the cause of it was the unintended and unexpected resistance of the wheel. He obviously meant unintended and unexpected by the workman. It is true that he said that "the rule that in contracts of insurance the proximate cause of loss can alone be regarded is carried so far that if it were rigidly applied to this Act of Parliament its evident object would in many cases be defeated." But he seems to me plainly to say this in order to make it clear that the construction of the Act ought to be more liberal as regards the claims of the workman than would be the case if the Act were construed with the closeness which distinguishes the construction of words in a contract such as that of insurance. For after pointing out that the word "accident" is not in its general use a technical legal term with a clearly defined meaning, and that, speaking generally but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss, he goes on to say that the word is often used to denote any unintended and unexpected loss or hurt apart from its cause, and that if the cause is not known the loss or hurt itself would certainly be called an accident. He then goes on to say that in this statute the word is used in a very loose way. The title speaks of accidental injuries; s. 1, sub-s. 1, uses the expression "personal injury by accident." Personal negligence, and even a wilful act on the part of the employer or any one for whom he is responsible, is not, Lord Lindley says, called an accident, but it is to be dealt with as if it were an accident. He goes on to say that it is impossible to read the Act without coming to the conclusion that the object of the Legislature was to throw upon certain classes of employers of labour the obligation to compensate their workmen for personal injuries for which such employers were not responsible before.

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He held that, as in the case before him the cause of the injury was known, and it was proved that the cause was an accident, it was not necessary to consider whether the Act applied to cases in which the cause of the injury was not known, or in which the only unforeseen occurrence was the personal injury itself. But, he added, if personal injury was caused to a workman, and it arose out of and in the course of an employment to which the Act applied, it appeared to him that prima facie the Act entitled the workman to compensation, though this inference might be displaced by proof that the injury was attributable to his own serious and wilful misconduct, or to some other cause which shewed that the injury was not accidental.

My Lords, if death or serious and permanent disablement results from the injury, even the fact that it is attributable to the workman's own serious and wilful misconduct does not shut him or his dependants out of the general right which the Act confers to compensation for injury by accident. Nor does the fact that the injury was caused by the wilful act of the employer or of some person for whom he was responsible shut it out. And I think that the language used in sub-s. 2 (*b*), where this is referred to, shews that the sub-section is introduced not because it was necessary for the extension of the definition of accident to such a case, but simply to make it clear that while the employer's liability, apart from the Act, remains unaffected, the employer is not to be under a double liability. The language used is introduced by way of proviso to the governing section, and the words used, especially in the conclusion of sub-s. 2 (*b*), seem to me to confirm the view that accident is used in s. 1 as including a mishap unexpected by the workman, irrespective of whether or not it was brought about by the wilful act of some one else.

My Lords, I think that the language of the judgments in *Fenton* v. *Thorley* (1), so far from being authority which supports the argument addressed to us from the Bar for the appellants, really assists the contention of the respondent. For that language lays stress on the wide-reaching scope of the statute in question. It shews how that scope extends the liability it embraces beyond liability for negligence, and covers a field akin to statutory

(1) [1903] A. C. 443.

insurance against injury to the workman arising out of and in the course of his employment, provided that injury is something not expected or designed by the workman himself. I think that this conclusion as to what the Legislature intended by its language is strengthened by s. 8, which places disablement from certain industrial diseases on the same footing as the happening of an accident. This provision seems to shew that what the Legislature had in view as a general object to be attained was the compensation of the workman who suffers misfortune.

My Lords, if the object of this statute be as wide as I gather from the study of its language, its construction must, as it appears to me, be that accident includes any injury which is not expected or designed by the workman himself. If so the Court of Appeal in England was right in its decision in *Nisbet* v. *Rayne* (1), that the definition extended to a case of death by murder, and the Court of Appeal in Ireland was right in *Anderson* v. *Balfour* (2), and in the present case, in taking a similar view of the meaning of "accident." To take a different view appears to me to amount, in the language of Mathew L.J. in *Challis* v. *London and South Western Ry. Co.* (3), to the reading into the Act of a proviso that an accident is not to be deemed within it if it arises from the mischievous act of a person not in the service of the employer.

The Second Division of the Court of Session refused to follow these decisions in *Murray* v. *Denholm.* (4) But I think, for reasons I have already given, that the Lord Justice-Clerk misinterpreted Lord Macnaghten's judgment in *Fenton* v. *Thorley* (5) when he read it as meaning that the expression "accident" cannot be applied to accident arising out of wilful crime. And I am confirmed in my view of the unrestricted rendering of the meaning of the word which I attribute to Lord Macnaghten by reading his subsequent judgment in *Clover, Clayton & Co.* v. *Hughes* (6), where he speaks of the "far-reaching application of the word," and intimates that what was held in *Fenton* v.

(1) [1910] 2 K. B. 689.
(2) [1910] 2 I. R. 497.
(3) [1905] 2 K. B. 154.
(4) 1911 S. C. 1087.
(5) [1903] A. C. 443.
(6) [1910] A. C. 242.

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Thorley (1) was that "injury" and "accident" were not to be separated, and that "injury by accident" meant nothing more than accidental injury or accident as the word is popularly used.

In the present case the facts leave little doubt on my mind that from one point of view at all events Kelly met with what may properly be described as an accident, and it was not the less an accident in an ordinary and popular sense in which the word is often used merely for the reason that it was caused by deliberate violence. For the rest, I have no doubt that there was evidence on which the arbitrator could find, as he did, that the accident so defined arose out of, and in the course of, the employment.

I am therefore of opinion that the appeal should be dismissed with costs.

I will only add that I have not arrived at this conclusion without examining a number of authorities which I have not referred to specifically. Having regard to the conflict which exists between judicial opinions expressed in some of the decided cases, the only safe guide appears to me to be the language of the Act of Parliament itself. It is on what I conceive to be the dominating purpose that appears in the language of the Legislature that I base my own view.

EARL LOREBURN. My Lords, in my opinion the order appealed from was right. This unfortunate man was killed because it was his duty to maintain discipline in a school, and while he was actually doing his duty there. There had been a conspiracy among the boys to assault and wound him because he did his duty, and in pursuance of the conspiracy two of the boys struck him a fatal blow. With all respect to those who hold a contrary opinion, I think the county court judge was entitled, in these circumstances, to say that John Kelly perished from "personal injury by accident arising out of and in the course of his employment."

A good deal was said about the word "accident." Etymologically, the word means something which happens—a rendering which is not very helpful. We are to construe it in the popular sense, as plain people would understand it, but we are also to

(1) [1903] A. C. 443.

construe it in its setting, in the context, and in the light of the purpose which appears from the Act itself. Now, there is no single rigid meaning in the common use of the word. Mankind have taken the liberty of using it, as they use so many other words, not in any exact sense but in a somewhat confused way, or rather in a variety of ways. We say that some one met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he is disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to research or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected, but it is not so always, for you might say of a person that he is foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment, would not be called accident, but would be so described if it occurred to another not similarly employed. A soldier shot in battle is not killed by accident, in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short, the common meaning of this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage for all cases.

Mr. Sankey ably urged upon us that this man could not have been killed by accident because he was struck by design. Suppose some ruffian laid a log on the rails and wrecked a train, is the guard who has been injured excluded from the Act? Is a gamekeeper who is shot by poachers excluded from the Act? There was design enough in either case, and of the worst kind. In either case I should have thought, if you looked at the nature of the man's employment, you might say he was injured by what was accident in that employment. When Lord Macnaghten, in *Fenton* v. *Thorley* (1), spoke of the occurrence being "undesigned," I think he meant undesigned by the injured person. One cannot imagine its being said of a suicide that he was killed by accident. I find that to treat the word "accident" as though the Act meant to contrast it with design would exclude from what I

(1) [1903] A. C. 443.

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am sure was an intended benefit numbers of cases which are to my mind obviously within the mischief. That makes me realize the value of the old rule about construing a remedial statute. Just as in the case of the guard or the gamekeeper, so here, this man was injured by what was accident in the employment in which he was engaged. It is not the less so that the person who inflicted the injury acted deliberately.

Possibly you might also say that he was killed by accident because the boys did not intend to kill him. But I put my opinion on the other ground.

I cannot attach weight to another argument of Mr. Sankey, that the risk of being killed by schoolboys is not to be regarded as incidental to or arising out of a schoolmaster's employment because no one would contemplate so extraordinary an occurrence. This argument illustrates the danger of trying to convey what an Act means by using expressions which are not found in it. I do not repent of having myself, as have other judges, in trying to convey my thoughts, spoken of risks incidental to an employment, but that does not mean merely risks which ordinarily occur in it. For the future, however, in order to prevent misapprehension, I shall confine myself to the actual words of the text. The words are "arising out of." Whether a particular mishap is likely to occur or likely to be feared or foreseen seems to me a different inquiry.

In inquiring whether or not an injury by accident in fact arises out of the employment, it surely is unnecessary to ask whether such a thing has ever happened before or is likely to happen again within, say, a hundred years, or, for that matter, for ever. It may happen, and has happened, and it has happened because the poor man was a schoolmaster. The event has proved that it arose out of his employment. I can see no reason for saying that there is to be compensation only when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer, or by a county court judge. All this has, in my view, no conclusive bearing on the simple question, Did it in fact arise out of the employment?

I am not at all surprised that the county court judge found as

he did. I think he was right, which, however, does not matter, because we have only to say whether the evidence justified the award.

LORD DUNEDIN. My Lords, the question here is whether the county court judge, sitting as an arbitrator under the Workmen's Compensation Act, had a right to find, as he did, that the deceased John Kelly, who was beaten to death by the boys of the industrial school of which he was an assistant master, met his death in respect of an accident arising out of and in the course of his employment.

I take it that your Lordships are all agreed that the composite expression used in s. 1, sub-s. 1, of the Act, "personal injury by accident arising out of and in the course of the employment," must be taken as a whole. Inasmuch, however, as it is impossible to discuss different considerations at the same time, and—to use a simile—inasmuch as the strength of a chain is always represented by its weakest link, there is, I think, no harm in treating the matter, as has, indeed, been done by your Lordship on the woolsack, in separate compartments, and in considering separately what is an accident, and whether any particular occurrence, if an accident, does arise out of and in the course of the employment. At the same time eventually the question that has to be answered is—to borrow a convenient expression from another branch of law—whether the occurrence in question fits the whole combination, not whether it fits a subordinate integer thereof.

A great deal of the argument turned upon the expressions used in the well-known case of *Fenton* v. *Thorley* (1), and particularly upon those used by Lord Macnaghten. This was natural enough, because that case was the first which dealt authoritatively in this House with the topic of what is an accident in the sense of the Act, and because the particular expression used by Lord Macnaghten has been frequently quoted and adopted as authoritative by other judges in subsequent cases.

The passage so often quoted is where Lord Macnaghten,

(1) [1903] A. C. 443.

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summing up his remarks, says, "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

My Lords, I think these words are a perfectly accurate pronouncement, but I do not propose to treat them as authoritative, for several reasons. In the first place, as I had occasion to point out in the recent case of *Plumb* (1)—with the approval of those of your Lordships who took part in the judgment—the ultimate criterion must always be found in the words of the Act itself, and not in tests, explanations, or definitions given by judges, however eminent. In the second place, Lord Macnaghten was not giving a definition, as he himself pointed out, in the subsequent case of *Clover, Clayton & Co.* v. *Hughes.* (2) In the third place, all phrases used by judges must be taken secundum subjectam materiem, and the class of "design" with which we have to do here was not in question in that case. It was, indeed, pointed out that in an earlier passage Lord Macnaghten speaks of injuries self-inflicted by design. I am not moved by that. That sentence is illustrative, not comprehensive, for it is introduced by the words "as for instance." The sentence I first quoted expresses in terms a general conclusion which sums up the whole discussion, and while I agree it must be conceded that the expression used cannot be taken authoritatively to decide a point which was not then in argument, yet it will be well to remember that persons who use accurate language may formulate a general rule which is quite accurate in its application to cases outside that which was at the moment under discussion.

There was, however, one matter of completely general application which I conceive was authoritatively decided by *Fenton's Case* (3), and that was that the expression "injury by accident" in the statute must be interpreted according to the meaning of the words in ordinary popular language. Lord Macnaghten says so in the passage quoted. He reiterates it solemnly in *Clover, Clayton's Case* when he says (4): "It is not perhaps quite accurate

(1) *Ante*, p. 62.
(2) [1910] A. C. 242.
(3) [1903] A. C. 443.
(4) [1910] A. C. at p. 248.

to say that in that case" (i.e. *Fenton's Case* (1)) "a definition of the term 'accident' was hazarded. It would be more correct to say that the decision was that the word 'accident' was to be taken in its ordinary and popular sense." Lord Davey, in *Fenton* v. *Thorley* (1), concurred in Lord Macnaghten's judgment. Lord Shand says: "I agree with my noble and learned friend (Lord Macnaghten) in thinking that the words 'personal injury by accident' and 'accident' are used in the statute in the popular and ordinary sense of these words." Lord Robertson, without actually using the expression "popular," puts his argument in this sentence: "No one out of a Law Court would ever hesitate to say that this man met with an accident"—which is obviously as much as to apply the "popular language" test. Lord Halsbury, in *Brintons* v. *Turvey* (2), says: "One proposition . . . . appears to have been accepted by all the judicial minds which have been directed to the subject, and that is that the language of the statute we are called upon to construe must be interpreted in its ordinary and popular meaning." In *Ismay, Imrie & Co.* v. *Williamson* (3) the noble Earl who has just preceded me referred to *Fenton's Case* (1) as a conclusive authority, and summed up his view of the facts by saying "In common language, it was a case of accidental death." And in *Clover, Clayton & Co.* (4) he took as conclusive what Lord Macnaghten had said in *Fenton* v. *Thorley.* (1) Lord Ashbourne in *Ismay's Case* (3), and Lord Atkinson and Lord Shaw in *Clover, Clayton* (4), all accept the same view, though differing in the application of the particular facts, that the word "accident" must be read in its popular sense. I forbear to quote from judgments of learned judges in the Court of Appeal and the Court of Session. As was necessary, they accepted what they conceived the members of the House of Lords had decided in *Fenton* (1) and reiterated on so many other occasions.

Now, there is no authoritative test of what is the meaning of popular language. On such a matter we are bound to take our own personal experience as persons well acquainted with popular language. For myself, I confess that it seems so clear that in

(1) [1903] A. C. 443.
(2) [1905] A. C. 230.
(3) [1908] A. C. 437.
(4) [1910] A. C. 242.

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popular language the injury in this case was not an injury caused by accident, that it is difficult for me to use terms which might not appear wanting in respect to those who have expressed themselves otherwise.

It must be conceded that the injury here was caused by design. That is to say, there was an intention to inflict an injury. To my thinking, the word "accident" in popular languag is the very antithesis of design. I brush aside at once all argument as to acts which can only be described as acts by design inasmuch as they are acts of conscious volition. The design of which I speak must be design to inflict the injury, not design to do the act which may, as it turns out, be the cause of the injury. Popular language bears me out in this distinction. If a workman kicks a brick off a scaffold and it happens to hit and injure a man below, popular language would say he had met with an accident. Popular language in this case, I maintain, would never say that Kelly met his death by accident. It would say that he was murdered. In so doing it might not be positively accurate. The crime as a crime may possibly not be murder, but only manslaughter, as, indeed, a jury found. But whether murder or manslaughter matters not. Both terms are negative of accident in the popular sense. And here I would like to say that in my view criminal law has nothing to do with the matter. Criminal law has to do with the mens rea. When one says that popular language would describe this as murder, that is because the narrator of what had happened would naturally use a positive expression which according to his view fitted the facts. The point is that he would not use the expression "accident" because he would consider it inappropriate. Suppose A. attacked B. and was shot by B. in self-defence, there would be no mens rea in B., and no crime. None the less, no one popularly would describe A.'s death as a death by accident.

Let me now pause to examine the judicial dicta on the matter. In the present case we get no assistance from the judgments of the Court below because the Court of Appeal admittedly decided the case on authority. They held themselves bound by their own decision in the case of *Anderson* v. *Balfour* (1) and studiously

(1) [1910] 2 I. R. 497.

avoided giving their own opinions. They had with them the support of the English decision in *Nisbet* v. *Rayne* (1), and against them the Scotch decision in *Murray* v. *Denholm*. (2)

Now these three cases exhaust the instances where the question of design to cause the injury as excluding accident came into question. I took the trouble to examine every case in Butterworth's Compensation Cases, New Series, to ascertain whether I was warranted in making this statement. I exclude *Challis's Case* (3) because there it is clear that there was no evidence whatever that the boy designed to injure the engine driver. For the same reason I can see no argument to be drawn from what might happen in the case of a derailed railway train where the derailment was caused by some one placing a chair on the rails with malicious intent, but with no proved design to injure the particular railway servant who was hurt. I also exclude all cases such as *Burley* v. *Baird & Co.* (4), *Fitzgerald* v. *Clarke* (5), *Armitage* (6), *Blake* v. *Head* (7), and others, where there was sufficient to decide the case upon the point that the accident, if accident it was, did not arise out of the employment. Reverting, then, to the three cases, it will be found that the three Scottish judges were in favour of the view that a designed injury cannot be called an injury by accident. I would especially refer to the judgment of Lord Dundas in the case of *Murray* (2), as it, in my view, sets forth with precise accuracy what has been laid down by this House, and puts the matter on the true footing of deciding by the ordinary use of popular language. The same view is taken by Cherry L.J. in the Irish case. "In the everyday language of educated people," says that learned judge, "an effect is said to be accidental where, and only where, the act by which it is caused is not done with the intention of causing it." If I might substitute the word "ordinary" for "educated" I would humbly accept this description of popular language as correct.

There remain of the opposite opinion the Lord Chancellor of Ireland (Walker C.) and Holmes L.J. in the Irish case, and the

(1) [1910] 2 K. B. 689.
(2) 1911 S. C. 1087.
(3) [1905] 2 K. B. 154.
(4) 1908 S. C. 545.
(5) [1908] 2 K. B. 796.
(6) [1902] 2 K. B. 178.
(7) 5 B. W. C. C. 303.

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Master of the Rolls and Farwell and Kennedy L.JJ. in the English.

Taking the Irish case first, I find that the judgments of the Lord Chancellor and Holmes L.J. are based on two considerations. The first is that accident, according to its derivation from the Latin, means anything that happens—an occurrence—and the Lord Chancellor quotes for this the Century Dictionary. That accident in its original meaning might be a mere occurrence may be admitted, but that that represents the popular meaning in 1897 or 1906 I entirely deny. And if dictionaries are to be appealed to it is worthy of note that the editors of the great Oxford Dictionary—a work of far greater authority than the Century—have, in accordance with quotations sought and found, attached to this meaning of the word the sign "obsolete." The other reason they give is that the point is ruled by *Challis's Case*. (1) That it certainly is not, for the reason already stated. Further, Holmes L.J. says that he agrees that in popular language assault would not be called an accident, but that he thinks the term in the Act bears a meaning other than the popular meaning. With great deference, that seems to me to be directly in the teeth of what this House decided in *Fenton* (2) and upheld in the other cases above cited.

I now pass to the opinions of the English Court of Appeal in *Nisbet's Case*. (3) The judgments are short. The Master of the Rolls puts his judgment on this, that it is an accident "from the point of view of the injured man," and then he goes upon the authority of *Challis* (1) and of the Irish case.

My Lords, I am bound to say, with the greatest respect, as I know the expression is used also by some of your Lordships, that I am quite unable to appreciate the method of considering the meaning of the words "from the point of view" of the injured man. Is it a good retort to say that it is not an accident "from the point of view" of the employer, who knows quite well it was designed? And if it is not, it is only, I humbly think, because the "point of view" of the injured man, or of the employer, or of the perpetrator of the deed, are all equally

(1) [1905] 2 K. B. 154. (2) [1903] A. C. 443.
(3) [1910] 2 K. B. 689.

irrelevant considerations. The only point of view which I consider relevant is the point of view of the Legislature, because the only question is, What did Parliament mean by the expression when it put it into the Act of 1897 and repeated it in the Act of 1906?

Farwell L.J., dealing with the same view, admits that murder is not usually spoken of as accident, and gives what I humbly think a fanciful explanation of why people would say that Desdemona was murdered. I have already said why I think people would use that phrase. They might well use others so long as they were positively describing the occurrence. They might say, for instance, that she was strangled by Othello. But the point of it is that they would *not* say, as Farwell L.J. admits, that she died by accident. He also goes on *Challis's Case*. (1)

Last comes Kennedy L.J. He takes the right view of *Challis's Case* (1), and then, instancing the death of Rizzio as a non-accidental death, goes on to say: "But whilst the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, *wherein is implied a negation of wilfulness and intention* [the italics are mine], I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm,' than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it."

Now, if language means anything, this means that the learned Lord Justice deliberately abandons what he admits to be the popular meaning of the word—which, according to the judgment of the House, he was bound to take—in order to give effect to what he considers the scope and object of the statute. I can scarcely conceive a proceeding more illegitimate.

Let me say a word as to this topic of the scope of the statute. It is said to aid the argument in favour of the enlarged meaning

(1) [1905] 2 K. B. 154.

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of accident to consider that the statute introduced a system of compulsory insurance of the workman by his employer. Again, with great deference, I cannot see that by this statement the argument is forwarded one whit—insurance let it be, but insurance against what? In a contract you find an answer to this question in the terms of the policy. Here the policy is the Act of Parliament, and by an interpretation of its terms you stand or fall. So that it only comes back to the same question, What is the meaning of the word as used? As for further speculations, these, I humbly think, are entirely outside our province. I shall only say that if judges were to indulge in speculations and reminiscences, we should probably find that such speculations and reminiscences did not altogether tally. But clearly we have nothing to do with such matters. Parliament might have left out the word "accident." It did not do so. On the contrary, it put it in, as Lord Macnaghten said, with the approbation of all the other Lords in *Fenton's Case* (1), "parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes," and we have got to interpret it. And in interpreting it I would like to say that I agree with my noble and learned friend Lord Atkinson, whose judgment, which he is about to deliver, I have had the advantage of reading, that the interpretation of accident given by the appellants really cuts the word "accident" out of the Act. I only do not enlarge on this point because it has been handled in a manner by my noble and learned friend which entirely satisfies me, and I wish to spare your Lordships a needless repetition. I would only add that to argue, as was done, that "accident" was necessarily inserted in order to exclude "self-inflicted injuries by design," seems to me out of the question. A self-inflicted injury by design would always be effectively excluded by the other condition, "arising out of the employment," for I cannot conceive any employment in which it is an incident that a man should intend to hurt himself.

I will now say a few words as to the finding that this was an accident arising out of the employment. It is said that this is found as a matter of fact, and that consequently we cannot

(1) [1903] A. C. 443.

interfere unless there was no evidence to support the finding. As to the general proposition that an appeal only lies as to law, and not as to fact, there is no doubt. But, with deference, I consider that a finding that an accident arose out of employment is not a finding of fact merely because it is found "as a fact." It may be a finding of mixed fact and law. I do not think it matters, because I am content to deal with the question as to whether there was evidence to support this finding. The finding itself in its ultimate form is really an inference from facts.

Now, while I think that there was evidence to support the view (although I might not agree with it) that in this particular school, looking to its history, there was risk of a blow being given by an unruly boy, I do not think that there was any evidence that there was any risk of a deliberate conspiracy to attack. The fallacy seems to me to consist in assuming that the moment you can label two things by the same name, namely, assault, these two things become the same. To spit in a person's face is an assault. If there had been evidence only that a boy had so spat at the master, I do not think it would follow that assault and battery was one of the risks of the employment. That, of course, is a more extreme case than this; but on the evidence I am of opinion that the arbitrator ought not reasonably to have come to the conclusion, from the history of the slight incidents proved, that subjection to a regular conspiracy to injure was a risk of this employment.

On the whole matter I put to myself the entire question in the words of the statute, Was what Kelly suffered an injury by accident arising out of and in the course of his employment? and remembering the repeated decisions of this House, that I am to take the language in the ordinary popular meaning, I answer unhesitatingly, No. The opposite view, with great deference, seems to me to distort the words used from this ordinary popular meaning in order to fit a conceived view of the general intentions of the Legislature, or, in other words, to assert in more cautious language what Kennedy L.J. asserted in plain but incautious language in *Nisbet's Case* (1) that he proposed to do,

(1) [1910] 2 K. B. 689.

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namely, "to stretch the meaning of the word." That, in my humble judgment, is to legislate and not to interpret. It may be that there are certain classes of employed people, such as prison warders and gamekeepers, the incidents of whose employment are such as to expose them to the risk of injury by wilful design. The remedy I humbly think is not for your Lordships to distort the meaning of accident, but to let the Legislature deal with the matter. The Legislature did step in as regards certain industrial diseases and for the purposes of the Act declared them accidents. It would in the same way deal with the cases—not many after all in number—to which I allude.

I am of opinion that the appeal should be allowed.

LORD ATKINSON. My Lords, I concur in the judgment which has just been delivered by my noble and learned friend Lord Dunedin.

The main facts of this case have been already stated.

In order to form an opinion as to the likelihood of outbreaks of turbulence or violence occurring in this school, or of any one engaged in its management contemplating such outbreaks as probable, and therefore to determine what risks were reasonably incidental to the employment of such a person as the deceased or arose out of it, it is necessary to bear in mind what was the class of person from which pupils of the school came, what the character of their general conduct, and what the history of the school. I assume that this was not an industrial school established under the 31 & 32 Vict. c. 25, nor a reformatory school established under the 59th chapter of the statutes of the same year. Its boy inmates, therefore, were not necessarily persons who had either actually committed crime, or from their mode of life and surroundings were likely to lapse into crime. The headmaster, Mr. Samuel Kelly, was examined as a witness. He had filled his post for twenty-two years. During that time several generations of boys must have passed through the school. There does not appear to me to be in the evidence any justification for the insinuation that he was stating what he did not believe to be true, or exaggerating in any way the peaceful character of the school.

He stated that an assault had been made upon him, he believed, by a boy named Reilly some twelve months before John Kelly's death. The actual words were, "He tried to prevent a boy getting out, and in coming downstairs he, Kelly, hurt his back. He never could tell whether he got a blow or not, but was told he was struck on the back by a boy, Reilly." He further said that this boy and another were inclined to be unruly before this assault on him, but that before the attack on Mr. Kelly he could see nothing wrong. This witness had, on May 17, 1911, made a confidential report in reference to this occurrence to the board of management. This report was obtained from the clerk of the board. The witness was not cross-examined upon it, nor was his attention directed to any portion of its contents, nor was it used to contradict him, but upon some principle of which I am ignorant, it was, on behalf of the applicant, whose witness the writer was, entered as substantive evidence of the truth of the statements contained in it. It was plainly inadmissible for such a purpose, but it does not appear to me to carry the matter further than did the evidence of the headmaster. He further denied that the boys generally were unruly—said that not more than one or two were inclined to be unruly, that none of those connected with the school ever saw things otherwise than this, that the boys were not bad boys in any way, that a Mr. Murtagh was assaulted some years before this occurrence by a boy who had left the school. He further stated that if a junior master heard of anything unruly in the conduct of the boys it would be his duty to report it to him, the witness, and that the deceased never had reported to him anything to that effect.

Mr. Joseph Murtagh, an assistant master, who had held that post for ten years, was also produced. He stated that a boy who had since gone out into the world and was doing well had struck him on the head with his (the boy's) hand; that it was a slight assault; that he was nothing the worse for it; that he immediately reported it to the headmaster; that the boy was punished. This witness, like the last, was examined on behalf of the applicant, on whom the burden of proof lay, and not a single question was put to him as to the general conduct of the boys

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for any period antecedent to the attack on the deceased. On that point the evidence of the headmaster remained unchallenged, and, in my view, if it be fairly considered, it leads one to the conclusion that up to the time of the attack upon the deceased the inmates of the school were not unruly, turbulent, or violent, and that no one acquainted with the school could reasonably have anticipated that such an occurrence as this criminal attack upon Mr. Kelly would ever take place.

The next matter of fact which, in my view, it is important to consider is the premeditation of the attack, the concerted preparation for it, as well as its violence.

Three pupils of the school, namely, James Brennan, John Contan, and Edward Harte, were examined on behalf of the appellants on the subject of the attack.

Their evidence appears to me to lead irresistibly to the conclusion that there was formed amongst these schoolboys, or some of them, peaceful though they may have been before, a deliberate conspiracy to assail the deceased, that in pursuance of that conspiracy they subsequently did assail him, and did inflict upon him injuries which immediately caused his death. It may be that they did not intend to kill him, most probably they did not, but the attack was very violent and most deliberate. If the injury which caused this unfortunate man's death be a "personal injury by accident" within the meaning of the Workmen's Compensation Act, then the most cold-blooded assassination, however elaborately planned and deliberately carried out, must equally be treated as "personal injury by accident" within the meaning of that statute. Now, the finding of the county court judge as to the nature of this conspiracy is stated at pp. 39—40 of the Appendix in these words: "It is evident from the facts proved that there was a conspiracy among a certain number of the boys to do an injury to Mr. Kelly. It was spoken of by and between them during the day, yet not a word of warning or a protest was uttered by one of them; they determined to commit this assault upon him because he caught and remonstrated with one of them stealing and interfered with their place of hockey playing."

That finding is abundantly supported by the evidence. For

the purposes of this case the criminal character of the act and the fatal nature of the result are in a sense immaterial. The same considerations would apply if the deceased had recovered. The first and most important question then is: Were the injuries so inflicted "personal injuries by accident" or, taking them collectively, a "personal injury by accident" within the meaning of the Workmen's Compensation Act, 1906? That is a question of law upon the proper construction of this statute.

It has been again and again decided by your Lordships' House that the language of the Workmen's Compensation Act of 1906, like that of its predecessor, the Act of 1897, is to be interpreted in its ordinary and popular meaning. In *Brintons* v. *Turvey* (1) Lord Halsbury says that this proposition has "been accepted by all judicial minds which have been directed to the subject." And in *Clover, Clayton & Co.* v. *Hughes* (2) Lord Macnaghten, when speaking of the much-criticized definition of the word "accident" which he was supposed to have laid down in *Fenton* v. *Thorley* (3), is, at p. 448, reported to have used these words: "It is not perhaps quite accurate to say that in that case a definition of the term 'accident' was hazarded. It would be more correct to say that the decision was that the word 'accident' was to be taken in its ordinary and popular sense."

If this be so, then, if there is to be any finality in these matters, it was, I think, from the date of the first of these decisions, and still is, the duty of every tribunal in this kingdom, including your Lordships' House, to accept these decisions and to apply loyally the principle they established. So that your Lordships' task in the present case is not, in my view, the difficult if not impossible one of framing a definition of the word "accident" or of the compound expression "injury by accident" to fit all cases which may arise under the Workmen's Compensation Act of 1906, but rather to determine whether, in this particular case, the premeditated crime, deliberately committed in pursuance of a conspiracy, can be described, according to the ordinary and popular meaning of language, as an "accident," or the injury inflicted by the criminals on their victim as an

(1) [1905] A. C. 230, at p. 232. (2) [1910] A. C. 242.
(3) [1903] A. C. 443.

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"injury by accident" within the meaning of this statute. To me it appears that the question only admits of an answer in the negative. I thoroughly concur with Kennedy L.J. when he lays it down, as he did in *Nisbet* v. *Rayne* (1), that "the description of death by murderous violence as an 'accident' cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention." Where I, with all respect, differ entirely from him is in thinking that, in the face of these repeated decisions of this House, it was open to him deliberately to reject the meaning which he admitted the word "accident" bore according to the common understanding, and to give to it another and a wholly different meaning in order to give effect to a supposed intention of the Legislature, which, speaking for myself, I fail to find either expressed or implied in the only place it can legitimately be sought for, namely, the provisions of the statute itself.

This phrase, "injury by accident,"—at least when applied to an injury inflicted by the act of an agent external to the workman himself—means, I think, an injury *caused* by an accident. The accident in such a case must be the cause, the proximate cause, I think, of the injury, the injury the effect of that cause. This is clearly the view of the noble and learned Lords who took part in the decision in this House of the anthrax case—*Brintons* v. *Turvey*. (2) Lord Halsbury (p. 233) says that the Act of 1897 meant that "the industry itself should be taxed with an obligation to indemnify the sufferer for what was 'an accident' causing damage." Lower down on the same page he uses these words: "But when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by the accident sets up a condition of things which medical men describe as disease."

Lord Macnaghten, at p. 234, says: "It is plain, I think, that the mischief which befell the workman in the present case *was due* to accident, or rather, I should say, to a chapter of accidents," and he then proceeds to enumerate the several accidents to

(1) [1910] 2 K. B. 689, at p. 696. (2) [1905] A. C. 230.

which the resulting injury was due. And Lord Lindley, at p. 238, used these words: "The fact that an accident causes injury in the shape of disease does not render *the cause* not an accident. Whether in any particular case an injury in the shape of disease is caused by an accident or by some other cause depends on the circumstances of that case, and on the meaning to be attached to the word 'accident.'"

In *Ismay, Imrie & Co.* v. *Williamson* (1), the heat-stroke case, Lord Loreburn, at p. 439, used these words: "In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known *cause*, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught." The italics are mine.

I should, therefore, have thought that where the injury is inflicted by the action of an agent external to the sufferer himself, and especially, as in this case, by human agents, this was obvious, and I should not have referred to these authorities, which might be multiplied, were it not that in argument it seemed to me to have been suggested that there is some peculiar and occult meaning concealed in this phrase, "injury by accident." It is to be remembered that in *Fenton* v. *Thorley* (2) Lord Macnaghten was dealing with the case of an injury self-inflicted, in the sense that the workman wilfully and deliberately did the act which caused the injury, that is, made a violent exertion which caused the rupture, but he did not intend or design to rupture himself or expect that he would rupture himself.

The workman thus filled two capacities. He was at once the doer of the act and the sufferer from it, and it certainly would appear to me that in Lord Macnaghten's so-called definition of the word "accident," the words "not expected or designed," if they applied to the workman at all, applied to him in the character of the doer of the act which caused the injury, rather than in that of the sufferer from the injury. He further stated that the expression "injury by accident" was

(1) [1908] A. C. 437.
(2) [1903] A. C. 443.

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equivalent to the expression "accidental injury," and that the words "arising out of and in the course of the employment" qualified this compound expression, "personal injury by accident," not the word "injury" by itself nor the word "accident" by itself.

Clover, Clayton & Co. v. *Hughes* (1) was also a case of an injury self-inflicted in the sense I have mentioned. The workman, by his exertion in turning a nut with his fingers, ruptured an aneurism of his aorta. Lord Loreburn in giving judgment, after having accepted the supposed definition of Lord Macnaghten, at p. 245 said: "The first question here is whether or not the learned judge was entitled to regard the rupture as an 'accident' within the meaning of this Act. In my opinion he was so entitled. Certainly it was an 'untoward event.' It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it." If by this latter passage it be meant that the character of the untoward event is to be judged of by a man of ordinary sense and understanding other than the workman, who knew the nature of the latter's work, I thoroughly concur; but if it means that this matter is to depend on whether or not the person injured expected the occurrence of the "untoward event" I respectfully dissent. Where by the deliberate act of a third party, who intends to injure a particular workman, an injury is actually inflicted upon that workman, the question whether the act of the third party is an "accident" or not, and the injury an "injury by accident" or not, cannot, I think, depend upon whether the workman expected or did not expect that act to be done, or that injury to be inflicted. Were it otherwise, this result would follow: If, for instance, two workmen in a factory, desiring to be revenged upon a foreman for having reported them to their employer for misconduct, should, without giving him any warning, or saying or doing anything to cause him to apprehend violence from them, stealthily assail him and wound him, the

(1) [1910] A. C. 242.

injury done would be an injury by accident, because he had not expected the attack; but if the workmen had threatened him with violence and he had lived in a constant state of apprehension that they would assail him, then the injuries they inflicted upon him would not be injuries by accident, because he had expected the attack which caused them, or, again, the "untoward event" would, in the case of a dull, stolid, unapprehensive man, be an accident, because he did not expect it, while in the case of a nervous, imaginative, and apprehensive man the same "event" would not be an accident, because he did expect it. I cannot think that a construction of the statute leading to a result so absurd can be a sound construction.

I dwell upon this point because of an expression used by Lord Collins in *Challis* v. *London and South Western Ry. Co.* (1) and substantially repeated by the Master of the Rolls and Farwell L.J. in *Nisbet* v. *Rayne*. (2) In the first of these cases Lord Collins said: "I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened being an accident from the standpoint of the person who suffered through it." In the latter case the Master of the Rolls said: "I think it was an accident from the point of view of Nisbet," the man who was shot. And Farwell L.J. said: "But the intention of the murderer is immaterial; so far as any intention on the part of the victim is concerned, his death was accidental; and although it is true that one would not in ordinary parlance say, for example, that Desdemona died by accident, &c." The learned Lord Justice goes on to give what, with all respect, appears to me to be a rather fanciful reason why people in ordinary parlance would not describe a deliberate murder as an accident. These expressions as to the "standpoint," "the point of view," and "the intention" of the victim, used in the connection in which they were used, are unintelligible to me unless they mean that the injury inflicted was not an injury by accident because the victim did not expect to be injured or did not intend that he should be injured. If so I think that view unsound.

In *Anderson* v. *Balfour* (3) the Irish Lord Chancellor's judgment

(1) [1905] 2 K. B. 154, at p. 156.
(2) [1910] 2 K. B. 689, at pp. 692, 693.
(3) [1910] 2 I. R. 497.

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seems to be based on *Challis's Case* (1), but Holmes L.J. seems to go still further in the above-mentioned direction. He said: "I agree, however, that an assault would not now be called 'an accident'; and that in modern language 'accidental' is used in contrast with 'intentional.' But it does not follow that the present and the other cases I have suggested are not accidents within the meaning of the section. The statute deals with what are regarded as accidents from the point of view of master and servant; and when they are defined by judges as something unforeseen, unexpected, and out of the usual or normal course of things, these words must be taken in connection with the employment." In other words, he decided that the word "accident," as used in this section, must have given to it a special meaning depending on the special point of view of both master and servant, not merely on that of the latter alone as suggested in the English cases, wholly different from its ordinary and popular meaning. With all respect that is the very thing which this House has many times decided must not be done. The decision in *Nisbet's Case* (2), as well as that in *Anderson* v. *Balfour* (3), is, I think, in reality based upon *Challis's Case*. (1) In my view both of these cases are quite distinguishable from *Challis's Case* (1)—first, because in the last named case there was no evidence whatever that the boy who dropped the stone upon the train intended to hit or harm the engine driver or any other person, whereas the injuries in both the former cases were deliberate and intentional, and, second, because in ordinary parlance the injury in *Challis's Case* (1) would be described as an accident, and in the other cases it would not be so described.

In my view, therefore, the decisions in both these cases were erroneous. I think, on the other hand, that the Scotch case of *Murray* v. *Denholm* (4) was well decided. In *Blake* v. *Head* (5) the Master of the Rolls, speaking of the deliberate homicide of an errand boy by his master, said: "Personally I do not think this was an 'accident' at all. I think it was an intentional felonious act, and the injury certainly did not arise out of the

(1) [1905] 2 K. B. 154.
(2) [1910] 2 K. B. 689.
(3) [1910] 2 I. R. 497.
(4) 1911 S. C. 1087.
(5) 5 B. W. C. C. 303.

employment." The case was no doubt decided on this latter ground, but I wish to express my thorough concurrence with the view of the Master of the Rolls that this intentional homicide was not an accident.

Lord Lindley, in *Fenton* v. *Thorley* (1), described the object of the statute thus. He said: "The object of the Legislature was to throw upon certain classes of employers of labour the obligation to compensate their workmen for personal injuries for which such employers were not responsible before, and it becomes necessary to determine what injuries are within the Act and what are not." He laid it down that s. 1, sub-s. 1, was the governing section, and then proceeded to consider what was meant by "personal injury by accident." It has been suggested that the policy of the Act was to insure the workman against loss. But against what loss? It would appear to me that the answer must be, against the loss sustained by "personal injury by accident." There is not a line in the Act that I can find indicating that compensation is to be given for loss of any other kind. I fail, therefore, to see how the assumption that the above is the policy of the Act, even if it be a sound assumption, helps one to determine what is the proper meaning of the words "personal injury by accident," or to justify the giving to those words a meaning which is other than their ordinary and popular meaning, and, least of all, to justify the construing of this section as if the word "accident" had been omitted from it. Nothing would have been easier for the Legislature than to have omitted the word "accident" if it desired to insure the workmen against loss by all personal injuries arising out of, and in the course of, their employment. That has not been done. The word is there, and must have some force and effect given to it.

Well, in the present case the cause of the injury was a known cause. It consisted in this, that one of the conspirators hit the deceased on the head with what proved to be a deadly weapon, a scrub. The effect was not an unusual effect of such a blow, namely, a fracture of the skull of the victim. Any person of ordinary sense and intelligence might well expect it would be caused by the blow. The injury, therefore, is neither the effect

(1) [1903] A. C. 443, at p. 454.

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of an unknown cause nor the unusual effect of a known cause. The blow was given deliberately and by design, and I cannot think that any person who saw the act done or heard of its having been done, and who was accustomed to express himself in ordinary popular language, would describe it as an accident. No doubt pupils in schools do not usually commit violent assaults upon their masters. The occurrence was, therefore, abnormal, but it is, I think, impossible to hold that every untoward event which is not normal is accidental.

It was admitted in argument, as I understood, and indeed it is self-evident, that if a workman deliberately and intentionally injures himself or commits suicide his injury or death could not be said to arise out of his employment. That being so, the question was put to counsel during the argument: If the judgment appealed from, and those authorities on which it rests, be sound, what injury to a workman arising out of and in the course of his employment can be held not to be "an injury by accident"? No answer was given to that question. To realize the difficulty of giving an answer, it is only necessary to enumerate roughly the classes of injuries arising out of and in the course of a workman's employment which have been held to fall within the section of the Act. If while actually doing, or by sleeping, taking food, or otherwise legitimately preparing or putting himself into a state and position to do, that particular business of his employer which it is his duty to do, he be injured through his own negligence, or that of his master, or of his fellow servant, or by a violent exertion of his own, or by the influence of any external agent or force, animate or inanimate, from an anthrax bacillus to a heat-wave, with which he may be brought into contact in that business, or by any fall to the ground, or against any object while similarly engaged, or if he be injured by the act of some third person done wilfully, but without being directed against him particularly, or done without the intention to injure him, as in *Challis's Case* (1), all these occurrences ex hypothesi arising out of and in the course of his employment would be within the statute, and, putting aside wilful misconduct in all cases where death or permanent disablement does not ensue,

(1) [1905] 2 K. B. 154.

would entitle him to compensation. If cases such as the present, where the workman is injured by the wilful, designed, and premeditated attack of a third party, be added to this list, then I cannot myself conceive any case in which an injury arising out of and in the course of the workman's employment would not fall within the section. And the reason for this is, in my view, plain. It is this, that to construe this section of the statute of 1906, so as to cover cases like the present, is in effect to eliminate the word "accident" from it altogether, and to read it as if it ran: "a personal injury arising out of and in the course of the employment." It may be desirable that the section should so run; on that point I express no opinion. But it does not so run; the word "accident" is contained in it. To construe the statute as if it were not there, even for the most benevolent object, is not, I think, permissible. It amounts, in my view, to legislating, not interpreting or declaring the law.

Having formed this opinion on this matter, it is unnecessary for me to deal at length with the point as to whether the injury to the deceased arose out of and in the course of his employment. The county court judge had no doubt found as a fact that the accident did arise not only out of the deceased's employment, but also in the course of his employment. Mr. Ronan, on behalf of the respondent, contended that this, being a finding of fact, was conclusive if there be evidence to support it, and that there is nothing more to be said on the point. I think that that contention is erroneous. This finding is a finding on a mixed question of law and fact, not of fact alone. It involves a decision on the proper construction of the section of the statute, and also a decision whether the evidence given brings the case within the provisions of the statute so construed. If the county court judge should put a false construction on the statute, misdirect himself, as it is styled, in a point of law, then his finding that the evidence brought the case within the statute so falsely construed would be of no avail whatever. The case of *Barnes* v. *Nunnery Colliery Co.* (1) is an instance of this.

The fault which I find with the findings of the learned county court judge on this point is this, that he appears to have judged

(1) [1912] A. C. 44.

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of the conduct of pupils of this school, and of the risk incident to an assistant master's employment in it, solely by reference to this murderous attack upon the deceased, to the exclusion of the whole history of the school for the twenty-two years preceding. There was nothing in that history, I think, to lead any one to anticipate that an attack such as was made upon the deceased would ever be made. I have, therefore, great difficulty in coming to the conclusion that the risk of such an outbreak of violence taking place was a risk reasonably incidental to the deceased's employment. If the matter be judged by this oft-applied test, the inclination of my opinion is that the injury by accident, if it was an injury by accident, did not arise out of the employment of the deceased.

Lord Lindley answered by anticipation in his judgment in *Fenton* v. *Thorley* (1), already quoted, Mr. Ronan's point on s. 1, sub-s. (*b*), of this statute. The statute did not enact that an injury caused by the wilful act or default of an employer, or of those for whom he was responsible, was an accident within the meaning of this section, but, to prevent multiplicity of suits, it enabled the workman to sue under the Workmen's Compensation Act for the compensation to which he could be entitled under Lord Campbell's Act as if it were such an accident, preserving, however, to the workman his right to sue independently of the Act in any case where the injury was caused by personal negligence, wilful act, or default.

On the whole, therefore, I am of opinion that the judgment appealed from was erroneous and should be reversed, and this appeal allowed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the material facts in this case are not in dispute. On February 12, 1912, the respondent's son was acting as an assistant master in the Trim Joint District School. This was an industrial school established for the training of children of the Meath and other union workhouses. There were placed upon the deceased, an assistant schoolmaster, certain duties of superintendence, management, and control, and

(1) [1903] A. C. 443.

it was his duty to exercise these both in school and in the playground.

On the evening of the day mentioned the deceased, when walking through a shed in the school grounds, was attacked by several of the boys of the school; they assaulted him with hurley sticks, and one of them in particular hit him with what is known as a scrub. The skull of the unfortunate master was fractured, and he died.

There can be no doubt that the attack was deliberate. As is explained clearly in the case for the appellants, the boys were angry with the deceased for various reasons. One was because he had stopped them from playing hurley in the school yard; another because he had caught one of them stealing.

During the trial the learned county court judge heard evidence bearing upon this assault and also upon previous assaults made by boys upon the masters. These had not been frequent nor serious. A letter, however, was, without objection, produced by Mr. Samuel Kelly, the headmaster of the school, dated February 17, 1911; and it no doubt appeared to the county court judge, as it also appears to me, to be of some importance. It is in the nature of a confidential report to the board of management, and in it the headmaster narrates that he "had to take extreme measures during the past month to put down immoral conduct which sought to get a foothold in this school among a small section of our boys." Among other things he reports that on the night of January 30 he himself was assaulted in the sick ward, that he hurt himself in capturing a boy, who however, escaped and was not found for two days, and that on the 13th he had again severely to punish another boy. He remarks on the signs of insubordination, and upon how he had placed himself in communication with the police. "I have now," he adds, "this conduct completely under control"—a state of matters which, however, did not appear to have been permanent. As already mentioned, there was a certain hostility to the deceased also; and it does not seem doubtful that the attack upon him was planned and was by way of revenge against him as, in the opinion of the boys, too strict a disciplinarian.

My Lords, there has been much discussion at your Lordships'

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Bar and in the Courts below as to whether this unhappy occurrence was an accident. The contention, of course, is that, once it is displaced from the category of accidents, the Workmen's Compensation Act cannot apply to it. This line of argument, however, is at times accompanied by, and apt to lapse into, a fallacy. Courts of law are not engaged in speculating upon what is an accident in general. They are engaged in solving a problem which is at once much more composite and much more specific; they are engaged in determining whether under s. 1 of the Workmen's Compensation Act "in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman."

I make this initial protest, my Lords, because it appears to me that the whole of this provision of the statute is apt to suffer and to be misread if it is merely analytically and not synthetically treated. It has been pointed out more than once that even the term "accident" does not in any view stand by itself. The expression is "injury by accident," and, as Lord Macnaghten has explained, it is accidental injury that is being dealt with, and not accident per se.

In the next place, my Lords, I must decline to entertain the proposition that the terms employed in the statute have not to be accepted by Courts at first hand, but that in lieu thereof there must be accepted equivalent or analogous terms, which must be taken to be the "definition," say, of the term "accident." The outstanding case of maltreatment (if I may put the term so strongly) of a judicial dictum in our own times has been upon this topic. It has been asserted over and over again in the Courts of each of the three kingdoms that Lord Macnaghten in *Fenton* v. *Thorley* (1) defined the term "accident," and that his definition is classical, is conclusive, and can for legal purposes be taken as standing for what the statute contains.

Lord Macnaghten undoubtedly said: "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." But, in the first place, it has to be remembered that this sentence was

(1) [1903] A. C. 443.

used immediately after, and in connection with another, namely, "The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." This points clearly to his use of the word "design" being restricted to cases of self-inflicted injuries. It would almost appear that this restriction by Lord Macnaghten himself has been completely lost sight of.. And it is at least due to Lord Macnaghten to say that he himself gave no countenance to the wider use that has been made of his language. In *Clover, Clayton & Co.* (1) Lord Macnaghten said: "It is not perhaps quite accurate to say that in that case a definition of the term 'accident' was hazarded." His Lordship is there referring to what has been put into his language as a definition, and he adds: "It would be more correct to say that the decision was that the word 'accident' was to be taken in its ordinary and popular sense." Almost in the same breath Lord Macnaghten expressed approval of a dictum of A. L. Smith L.J., who speaks of "accident" as meaning "any unforeseen circumstance, however caused, occurring to" a workman "in the discharge of his duty in the company's service." Of this, my Lords, I am certain, that the so-called definition was never meant to be an exclusion from the term "accident" of everything that happens by design.

I am of opinion that there is no necessary exclusion of what occurs by design from the category of injury by accident, as that term is used in s. 1 of the Workmen's Compensation Act. It has to be remarked that if the word "accident" were so construed, that is to say, by excluding all occurrences which were designed, it would seem to me to be inconsistent with its common application to a great part of the law of tort in England. Mr. Ronan was, I think, justified in referring to Lord Campbell's Act (9 & 10 Vict. c. 93), which stands in the Statute Book under the title of "An Act to compensate the Families of Persons killed by Accident," and under which compensation is given for what is caused by wrongful act, neglect, or default. I have never heard

(1) [1910] A. C. 242.

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of a proposal to exclude from the category of accidents in which relief was sought under Lord Campbell's Act any act which was wilful, intentional, or deliberate. These are the worst kind of wrongful acts. They are the cause of loss or damage in innumerable cases, and yet, according to the argument submitted, the English Statute Book completely misnamed this remedial statute by taking all deaths from such occurrences as the deaths of persons killed by accident. When, over and over again, it is announced that the words of the Workmen's Compensation Act must be construed according to their ordinary and popular signification, I entirely agree; but I think it is surely part of that popular and ordinary signification that for seventy years in England the word "accident" has been publicly and descriptively used as inclusive of occurrences intentionally caused. I will not carry the controversy into the wider literary field, because in that field the interest is apt to exceed the relevancy. Judges have girded at Farwell L.J.'s instance of Desdemona's murder, and I do not disagree with them. But I should have thought, on the other hand, that when a certain "unvarnished tale" was delivered "of moving accidents by flood and field," the term put into the mouth of Othello was hardly meant to be exclusive of the perils of wilful onset, of seizure by "the insolent foe," or of any other intended and "distressful stroke."

But, my Lords, the synthesis must be carried further. "Injury by accident" cannot be treated apart from the fact that it is such injury by accident which is caused to a workman arising out of, and in the course of, his employment that is the subject of the legislation. Every part of this cumulative expression may bear upon every other. And an easy instance of the value of such collocation arises to assist the solution of the problem of whether a designed occurrence falls within the term accident. For the point of view of the Legislature is seen from the composite expression to be the workman's point of view. And it is to be observed that what occurs to the workman may from his point of view be plainly an accident although some mischievous person may have designedly caused the occurrence.

This is well illustrated in the case of *Challis* (1), the case of a

(1) [1905] 2 K. B. 154.

stone which was intentionally dropped from a bridge on a passing train. As Lord Collins—then Master of the Rolls—observed, "I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it." This language was adopted by Lord Chancellor Walker in the case of *Anderson* v. *Balfour* (1), of which I approve and to which I will presently refer. But in the case of *Nisbet* v. *Rayne* (2) the same view, namely, that "accident" to an employee may include what was an occurrence designed by some one else, is taken. That was the case of a cashier who, while travelling by rail to a colliery with a large sum of money for the payment of the workmen, was robbed and murdered, and the Master of the Rolls says, "I think it was an accident from the point of view of Nisbet," that is, the servant. And Farwell L.J. says this: "It is argued, first, that there was no 'accident' at all, because death resulted from the intentional act of the murderer, and intention excludes any idea of accident. But the intention of the murderer is immaterial; so far as any intention on the part of the victim was concerned his death was accidental." I am humbly of opinion that both *Anderson* (1) and *Nisbet* (2) were rightly decided.

Nor does the term "accident" become divorced from its ordinary significance by this reasoning. If a train is deliberately derailed, with the result of lives being lost or passengers injured, the whole of these consequences are perfectly properly denominated deaths or injuries in a train accident.

But, my Lords, the synthesis must still proceed, and for the same reason, that each portion of the combined expression helps to clarify the other. The nature of the employment must also be looked to, because it appears to me—and here the present case is very closely approached—that it may be a vital and determining factor in the consideration of the question at issue, whether the nature of the employment was such as to allow of the occurrence being treated as an injury by accident to the servant. Some employments are practically unaccompanied with danger from wilful occurrences, others are so accompanied. In the case of a

(1) [1910] 2 I. R. 497. (2) [1910] 2 K. B. 689.

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warder in a prison, he may, with certain classes of prisoners, require to go armed, and to be in constant watch over the preservation of his own life. He hopes to succeed, and possibly in ninety-nine cases out of a hundred he does, but in the hundredth case an accident takes place, and his injuries on such an occasion fall within the very risks which attach to his employment. They have been wilfully caused, but his hope and expectation was that he would survive uninjured. When the occurrence takes place, however, it is properly denominated as an accident arising out of his employment. Take, again, an attendant in an asylum placed in charge of dangerous lunatics. He is aware that at any moment not one but all of those over whom he has control may individually, or in combination, turn and injure him. I do not think it would be in any sense straining the popular meaning of the words to say that such an attendant had been injured by accident arising out of and in the course of his employment. Such accidents, in short, spoken of in that general language, were the very things that were taken account of as possible when he made his contract of service. Take a third case—the case of a gamekeeper who in the course of his duty has to watch over the property committed to his charge as against the marauding of poachers. Injury or loss of life to him on such an occasion would, in my opinion, be properly classed as an accident arising out of and in the course of his employment, and, as I say, I think the Irish case of *Anderson* v. *Balfour* (1) to that effect was properly decided.

The stage of the argument thus reached is that, even although the discussion were confined to the term "accident," that term would not be exclusive of designed occurrences, or even necessarily of deliberate crimes, these last depending, as has been seen, to some extent on the nature of the employment. I am, therefore, of opinion in the present case that that part of the argument fails.

I have had more difficulty, my Lords, with regard to the question whether this accident, which undoubtedly arose in the course of the deceased's employment, also arose out of it. But the illustrations which I have given of the warder, the asylum

(1) [1910] 2 I. R. 497.

attendant, the gamekeeper, shew that the question as relating to the nature of the employment is one of degree: and the question is whether the circumstances of this case and the nature of the employment of the late Mr. Kelly were such as to permit it to be stated that he died by injury from accident arising out of that employment. It is, my Lords, a question of circumstances, and, as I have put it, a question of degree. If it is said that the case of a prison, an asylum, or a game preserve, should not be extended to the case of a school, the answer is: It depends upon the circumstances and upon the school. One could conceive certain portions at least of a reformatory school to which the principle would manifestly apply. Did it accordingly—for that is the question—apply to the circumstances and the case of the Trim Industrial School?

My Lords, upon this part of the matter the statute comes to our aid. The statute has recognized the possible variation in the circumstances and in degree, and it has laid it upon the county court judge, acting as arbitrator, to determine the question as one of fact. I accordingly hold that it is not open to us, as a Court of law, if, as a question of fact, this has been substantively determined in the one way or in the other, to overturn that finding. If it was a question of law, or even of mixed law and fact, it would be different; but when it is a question of degree, of circumstances and of fact alone, our interference would be in the nature of a usurpation of the province committed definitely by the Legislature to the county court judge as final arbitrator.

My Lords, this House has frequently had to consider this subject in its bearing upon the question of dependency, and I do not repeat the views which I have more than once enunciated upon that subject, to the effect that whether dependency exists or whether it is total or partial—all these are questions of fact. But the House has adopted precisely the same attitude with regard to the question of whether the injury by accident arose out of the employment. That was one of the difficulties in the much-contested case of *Clover, Clayton & Co.* (1), where a man suffering from a dangerous aneurism fell down dead when fastening a nut with a spanner. Lord Macnaghten put the

(1) [1910] A. C. 242.

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question thus: "The real question, as it seems to me, is this, Did it arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting; but he has held that it did, and I think there was sufficient evidence to support that finding, although I do not say I should have come to the same conclusion myself."

My Lords, that appears to me to be a line of helpful guidance for Courts of law. *Warner* v. *Couchman* (1) was the case of a journeyman baker whose hand had been injured by frost-bite while driving on his round in his employer's cart in the course of his duty. As Lord Loreburn said, "I see nothing in the evidence which would disentitle him to find that fact, and being so found as a fact it is binding." And if I may cite my own view, "The findings of the learned county court judge are really two in number. First, negatively, he has found that this unfortunate workman was not injured by accident arising out of his employment. Secondly, positively, he has found that, being set to ordinary outdoor work, he was injured by the severity of the weather. Both of these findings, my Lords, are findings of fact. I do not think that it is the province of a Court of Appeal to disturb such findings." It is unnecessary, my Lords, to examine from this point of view the cases further, except to say that the judgment of Lord Kinnear in *Henderson* v. *Glasgow Corporation* (2) has, I understand, always been considered of the greatest weight in Scotland. It was expressly approved, and it was largely quoted in the decision of the case of *Jackson* v. *General Steam Fishing Co.* (3) in this House. One passage in that judgment I will venture once more to cite: "It has been sometimes said that the question in that kind of case is raised in very much the same way as if we were asked to consider a hypothetical charge given by the sheriff as judge to himself as a jury, and to find that he had given himself a wrong direction. But then that kind of question never can arise when the sheriff says in so many words, 'I think this is a question of fact, and I decide it upon the facts; I have not proceeded upon law at all.'"

(1) [1912] A. C. 35. (2) (1900) 2 F. 1127, at p. 1138.
(3) [1909] A. C. 523.

I think, my Lords, that is how the law stands with regard to this point, and I think the present case is exactly of that kind.

It remains only to inquire whether the arbitrator's finding on this matter of fact was come to without evidence. Upon this point I must cite in the first place the clear manner in which the county court judge has stated the point himself. With regard to whether the occurrence was an accident he expresses himself guardedly, and undoubtedly presents a question of mixed fact and law, for he says: "I am of opinion and hold as a matter of fact, that the occurrence amounted to an accident within the authority of the decisions of the two cases referred to." This in terms raised the whole legal situation, and upon that head of the matter your Lordships are determining the point. But with regard to whether the accident arose out of his employment, the learned county court judge takes—and in my opinion was justified in taking—a different line. He narrates the various facts upon which he proceeded; he gives the substance of the evidence as laid before him; he considers the assaults on the masters from time to time, and the facts which led up to Mr. Kelly's death; he concludes that the masters had to deal with boys some of whom were unruly, vicious, and badly disposed; he considers that some of them were dangerous; and he says that he has "come to the conclusion that there was a certain risk of violence known to Kelly from certain of the boys attendant on his position as master." He winds up by finding "as a matter of fact the accident arose out of his employment." I do not feel myself free, my Lords, to say that he came to a wrong conclusion, and I certainly do not think that there was not evidence in the case upon which such a conclusion could have been reached. The learned arbitrator appears to have handled the case with care. I do not think he made any mistake in law, and I am of opinion that his findings in his own province, that of fact, cannot be disturbed.

For these reasons I think that the judgment of the Court of Appeal should stand.

LORD PARKER OF WADDINGTON. My Lords, I agree with my noble and learned friends Lords Dunedin and Atkinson. Indeed

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but for the difference of opinion which exists among your Lordships, and but for a certain mental confusion induced by perusing a number of reported decisions, I do not think I should have felt much hesitation in advising your Lordships in this case.

The Workmen's Compensation Act, 1897, was a new departure in legislation. It conferred on "workmen," that is to say, on all persons (with certain exceptions) who have entered into or work under contracts of service or apprenticeship with an employer, the advantage of being insured at the employer's expense against certain kinds of personal injury. There is absolutely nothing, except the words used in the Act itself, which can throw any light on the kinds of personal injury to which its provisions were intended to apply. There is no pre-existing policy of the Legislature by reference to which the provisions of the Act can be interpreted.

The Act of 1897 was amended in an unimportant particular by the Workmen's Compensation Act, 1900, but both Acts were repealed, and, with certain modifications, re-enacted by the Workmen's Compensation Act, 1906, the Act now in force. The words of the first Act, which describe the kinds of injury against which workmen are to be insured at the cost of their employers, remain unaltered in the Act of 1906, and the modifications introduced by the latter Act do not affect their meaning. They are as follows: "Personal injury by accident arising out of and in the course of the employment." The Act contains no definition which throws any light on the meaning of these words. Applying, therefore, the ordinary canon of construction, they must be interpreted according to their ordinary meaning. Indeed, in an Act which confers a benefit on workmen and imposes a corresponding liability on employers, there is a specially strong presumption that the words used are intended to bear their ordinary meaning so as to be readily understood by the parties concerned, workmen and employers alike.

When, therefore, a question arises as to whether some particular personal injury is an injury by accident within the Act, the question ought, in my opinion, to be decided in the affirmative or in the negative according to whether the particular personal injury can or can not, without straining or departing

from the ordinary meaning of the words used, be described as an "injury by accident" or, to use a linguistic equivalent, "an accidental injury." A process of interpretation which proceeds first to define or analyse the various elements denoted or connoted by the words "injury by accident" or "accidental injury," and then considers how far the particular personal injury in question is within this definition or involves these elements, is not only, in my opinion, a wrong process, but one extremely liable to lead to error. Thus it was at one time argued that "injury by accident" necessarily involves (1.) an injury, and (2.) an accident causing the injury, and from this it was sought to draw the inference that a workman who strained his back in lifting a heavy weight or ruptured himself in endeavouring to turn a stiff wheel did not suffer an injury by accident within the meaning of the Act, for though he suffered injury, it did not arise by reason of any accident, but by reason of something done or attempted with deliberate intention.

Obviously the result of such a process of reasoning would be to exclude from the Act many personal injuries which are ordinarily described as accidental, and accordingly it was finally determined by your Lordships' House in *Fenton* v. *Thorley* (1), as I understand the decision, that such a process of reasoning was fallacious. It would, in my opinion, have been none the less fallacious had it resulted in including among injuries by accident injuries which, according to the ordinary use of language, could never be described as accidental. Indeed, if it be once admitted that the words "injury by accident" are in the Act used according to their popular meaning, any definition of accident which either excludes injuries commonly described as accidental, or includes injuries which according to the ordinary use of language are never so described, is demonstrably an imperfect definition.

I will now ask your Lordships to consider the facts of this case. They may be stated as follows. John Kelly was employed by the appellants as assistant master in an industrial school of which the appellants were the managers. He had the misfortune to incur the ill-will of the boys under his charge, and some of those boys conspired together to assault and injure him.

(1) [1903] A. C. 443.

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They did assault him, and they injured him so effectually that he died of the injuries they inflicted. Is his mother entitled to compensation? As I have already indicated, it appears to me that this question can only be answered by considering whether John Kelly can, without any misuse of language, be said to have been accidentally injured or accidentally killed. In my humble judgment, having regard to the circumstances under which the injuries were inflicted and the death occurred, no one could, without a serious misuse of language, describe either the injuries themselves or the death which resulted from them as accidental. Such a description would not only conceal but would positively misrepresent the true facts.

How then is it proposed to shew that these injuries and this death, which in no ordinary sense of the word can be described as accidental, are injuries by accident within the meaning of the Act? The arguments to this effect may be stated as follows:—

First (it is said), an injury to be accidental must be more or less sudden, more or less unexpected, and not self-inflicted. Kelly's injuries fulfil these conditions, and are, therefore, accidental. My Lords, I have purposely stated this argument in such a way that the fallacy is apparent. In order to preclude the fallacy, the major premise should be to the effect that every injury which is more or less sudden, more or less unexpected, and not self-inflicted, is an accident within the Act, but in so framing the major premise you in fact abandon all idea of interpreting the Act according to the ordinary meaning of the words, and introduce a special and somewhat arbitrary definition clause, which extends the popular meaning of the word "accident" so as to embrace what in ordinary language would never be described as accidental. The process of interpretation you employ is precisely that process which is condemned in *Fenton* v. *Thorley* (1), although in the present case it operates in favour of, and not against, the interests of the workman. Had the Legislature intended that workmen should be insured at their employers' expense against all injuries more or less sudden, more or less unexpected, and not self-inflicted, it was easy enough to say so.

(1) [1903] A. C. 443.

Secondly, the case for the respondent was based on the reasoning which prevailed in the English Court of Appeal in *Nisbet* v. *Rayne*. (1) It was argued that had Kelly been injured or killed by a blow aimed at another he would undoubtedly have been injured or killed by accident. The fact that the blow was aimed at him is, "from his point of view," quite immaterial (Cozens-Hardy M.R., at p. 692). Indeed, but for the fact that our logic is misled by our moral indignation, we might, although in fact we do not, call injury or death feloniously inflicted accidental injury or accidental death (Farwell L.J., at p. 693). It is unreasonable to suppose that the Legislature intended to draw so refined a distinction, and this justifies some departure from the ordinary meaning of the words used (Kennedy L.J., at p. 696). My Lords, it appears to me that any argument framed on these lines not only abandons the principle of interpreting the Act according to the ordinary meaning of the words used, but substitutes a method of interpretation based upon what, in the opinion of individual judges, the Legislature may be reasonably supposed to have intended, a method which, in my judgment, is without any justification at all.

Thirdly, it was suggested that the Act discloses an intention that workmen should be insured by their employers against all classes of personal injury arising out of, and in the course of, the employment, unless such injuries can be proved to have occurred otherwise than by accident, the onus of proof of which lies on the employer. With all due deference to what was said by Lord Lindley in advising the House in *Fenton* v. *Thorley* (2), I am unable to apprehend any valid ground for this suggestion. The Act imposes on employers a liability to insure their workmen from personal injuries which are (1.) accidental and (2.) arise out of and in the course of the employment, and I see no reason for imputing to the Legislature any further or other intention. There are injuries arising out of, and in the course of, the employment which are not accidental, and accidental injuries which do not arise out of, or in the course of, the employment. I cannot see how the fact that an injury arises out of and in the course of the employment can raise any

(1) [1910] 2 K. B. 689. (2) [1903] A. C. 443.

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legitimate presumption that it is accidental, any more than the fact that it is accidental can raise any legitimate presumption that it arises out of or in the course of the employment. Much less do I see how proof of one of the conditions necessary to render the employer liable can shift the onus probandi as to the other.

Lastly, it was argued that injury by accident was none the less injury by accident because the accident was the result of such criminal negligence as would justify a verdict of manslaughter. In this I agree, because the ordinary use of the word "accidental" would cover such a case, but I am unable to follow the inference sought to be drawn from this premise to the effect that all injuries inflicted feloniously must necessarily be accidental, though no one using the word in its ordinary meaning would so describe them.

My Lords, there is another important question arising on this appeal. Even assuming, contrary to my opinion, that Kelly's injuries were accidental within the meaning of the Act, can they be said to have arisen out of and in the course of his employment? I hesitate to come to that conclusion. It would, I think, be a libel on the industrial schools of the United Kingdom to say that an assistant master runs any special risk of being assaulted, or murdered, much less any special risk of being the victim of a deliberate conspiracy to assault or murder. Any person may incur the ill-will of others, and, if these others happen to include persons of violent or revengeful temper, may be assaulted and injured in consequence. But this is a risk which every one must run, and does not arise out of any particular kind of employment. If Kelly's injuries arose out of his employment within the meaning of the Act, it would seem to follow that any shop superintendent, any overseer, or foreman, and, indeed, any person placed in authority over others who incurs the ill-will of, and is in consequence assaulted or injured by, some subordinate, would be entitled to compensation. It is true that in the present case certain special facts have been found, and that on the strength of these facts the arbitrator has decided that Kelly's injuries did arise out of his employment. But there is nothing to shew that the arbitrator directed himself properly as to the meaning of the Act, and therefore nothing to prevent your Lordships from saying that the special facts did not justify the decision. Your

Lordships will not be overruling the arbitrator on the facts, but merely deciding that the facts found by him do not, as a matter of law, bring the case within the Act, properly construed.

In my opinion the appeal should be allowed.

LORD READING. My Lords, the deceased, John Kelly, was an assistant schoolmaster employed by the appellants in an industrial school. He was savagely struck by boys attending the school who had deliberately planned and concerted an attack upon him because of restrictions he had imposed upon them in the discharge of the duties attaching to his employment. The injuries inflicted resulted in his death. The boys were tried for murder and were convicted of manslaughter.

The respondent in this appeal, a dependant within the meaning of the Workmen's Compensation Act, 1906, claimed compensation under this statute for the injury caused to Kelly. For the appellants it was contended, (1.) that the injury was not an "injury by accident," and (2.) that the injury did not arise out of and in the course of his employment.

The learned county court judge decided against the appellants on both points and made an award in favour of the respondent which was affirmed by the Court of Appeal. The appellants have relied upon the same two points in argument before your Lordships.

The first contention is that, as the injury to the deceased schoolmaster was inflicted by design, it was not an "injury by accident" within the meaning of the statute. The answer to the question thus raised depends upon the meaning attributable to the language of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, namely, "an injury by accident arising out of and in the course of the employment." There has been much judicial discussion and some diversity of opinion as to the correct interpretation of these words. Having regard, however, to the close examination by your Lordships of the arguments and of the various authorities, I shall not consider them again in detail, more particularly as I agree with the interpretation placed by the noble and learned Viscount on the woolsack upon the particular words under discussion and also with the conclusions he has

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drawn from a review of the cases. Lord Halsbury said in *Brintons* v. *Turvey* (1), when dealing with these words in the Workmen's Compensation Act, 1897, that the language of the statute must be interpreted in its ordinary and popular meaning. It is not in controversy that the intention of the Legislature as gathered from the statute of 1897 and the later statute of 1906 was to impose upon the employer a much heavier obligation than had hitherto existed to compensate the workman for injury suffered by him in his employment; the only question here in dispute is whether that obligation extends to injuries inflicted by the design of another. Construing the words in their ordinary and popular sense, I think they mean an injury caused to the workman by some sudden and unexpected occurrence, whether the injury was inflicted by design or otherwise, as distinguished from an injury caused to him by some gradual process. For example, if a workman became blind in consequence of an explosion at the factory, that would constitute an injury by accident; but if in consequence of the nature of his employment his sight was gradually impaired and eventually he became blind, that would be an injury, but not an injury by accident. If your Lordships were to hold that because a workman was injured by the design of another he was excluded from the benefits of the statute, strange results would follow. The gamekeeper who is set upon by poachers, the warder who is attacked by prisoners, the ticket collector at a railway station who is assaulted by a passenger, the night watchman at a bank who is struck by a thief, are instances of workmen who would be excluded from the right to compensation if this appeal were allowed, notwithstanding that they were injured whilst performing the duties of their employment. It is difficult to see why the Legislature should have drawn this sharp distinction and have provided that, while the employer is bound to compensate even the workman whose injury is attributable to his own serious and wilful misconduct (if it results in death or serious or permanent disablement), he is to escape the payment of compensation to the workman who in the performance of his duties is injured by the design of another. If a person slip on a piece of orange peel and break his leg, it

(1) [1905] A. C. 230.

will be said, in ordinary and popular language, that he has met with an accident, notwithstanding that some person out of mischief or intention to injure him has placed the orange peel in his path. It is an accident to him notwithstanding that it was caused by the design of another. The current of authorities in the Court of Appeal in England and also in Ireland supports this view. The decision to the contrary in *Murray* v. *Denholm* (1) is based, in my opinion, to a large extent upon a misunderstanding of the passage in Lord Macnaghten's judgment in *Fenton* v. *Thorley* (2), subsequently explained by him in *Clover, Clayton & Co.* v. *Hughes.* (3) When Lord Macnaghten's words are carefully considered, and especially with the assistance of his observations in the latter case, it is apparent that he was referring only to injuries self-inflicted by design and that he never intended to decide that an injury caused by the design of another could not be within the words of the section.

The appellants laid much stress upon one argument with which I desire to deal in particular. They contended that some meaning must be given to the words "by accident," and Mr. Sankey argued that these words were inserted by way of limitation upon the obligation of the employer, and that, if this House were to affirm the judgment of the Court of Appeal in this case, following other decisions of the Courts in England and Ireland, your Lordships would be reading the section as if the words "by accident" were not there. I agree that these are words of limitation, but I think they were inserted by the Legislature for a definite purpose, and will still be effective for that purpose if your Lordships affirm the judgment of the Court of Appeal. If under the 1st section the words "by accident" were omitted and compensation was made payable to a workman who suffered an "injury" arising out of and in the ordinary course of the employment he might recover compensation if, for example, his sight became gradually impaired owing to the nature of his employment. But when the Legislature enacted in 1897 that the workman included in that statute should be indemnified for injury arising out of and in the course of his

(1 1911 S. C. 1087. (2) [1903] A. C. 443.
(3) [1910] A. C. 242.

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employment, it did not intend to give compensation for all such injuries and therefore inserted the words "by accident" in order to exclude the right to compensation for injuries not caused by some sudden and untoward event. By the statute of 1906 Parliament widely extended this right of workmen to compensation for injury, and by s. 8 provided, for the first time in this class of legislation, that in certain circumstances and within certain limits a workman who had contracted a disease due to the nature of his employment should be entitled to compensation, and that disablement or suspension from his employment owing to such disease should be treated as the happening of an accident. But this section is made applicable only to certain diseases, and if since the passing of this statute a workman suffers injury from a disease so contracted to which this section does not apply, or if he cannot satisfy the conditions and bring himself within the ambit of the section, he is still not entitled to compensation notwithstanding that he has suffered an injury arising out of and in the course of his employment.

Therefore, in my judgment, assuming that the words be held to mean injury by a sudden or unexpected occurrence whether caused by design or otherwise, they will still find their place and effect their purpose as words of limitation upon the obligations of the employer.

Upon the second point the only question for your Lordships is whether, as a matter of law, there was evidence to support the finding of fact of the learned county court judge. I think, for the reasons already given by some of your Lordships with whose conclusions I agree, that the evidence was sufficient.

I am of opinion that this appeal should be dismissed.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, April 6, 1914.

Solicitors for appellants: *Dawes & Sons, for Hoey & Denning, Dublin.*

Solicitors for respondent: *Ellis & Ellis, for Francis C. O'Reilly, Dublin and Trim.*

[HOUSE OF LORDS.]

SMITH . . . . . APPELLANT; H. L. (SC.)*

1914

AND

April 28.

FIFE COAL COMPANY, LIMITED . . . . RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Breach of Mining Regulations—Miner doing Shot-firer's Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the cable, first, with the charge and, thereafter, with the firing apparatus, after seeing that all persons in the vicinity had taken shelter.

A duly appointed shot-firer, in breach of these regulations, handed the cable to a miner for the purpose of having it connected with the charge, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, connected the cable with the firing apparatus. He then fired the shot, and the miner, who had connected the cable with the charge and had not had time to retire to a place of safety, was injured by the explosion :—

Held, that the essential cause of the accident was not the unauthorized assumption by the miner of the shot-firer's duty, but the premature firing by the shot-firer, and that there was evidence to support the finding of the arbitrator that the injury to the miner arose out of and in the course of his employment.

Kerr v. *William Baird & Co.*, 1911 S. C. 701, distinguished.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 662, reversed.

APPEAL from an order of the Second Division of the Court of Session in Scotland recalling an award of the sheriff-substitute of Fife and Kinross sitting as arbitrator under the Workmen's Compensation Act. (1)

The appellant, who was a miner employed by the respondents at their mine, Benarty Pit, claimed compensation in respect of an accident which occurred on June 28, 1912.

* *Present:* LORD KINNEAR, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) 1913 S. C. 662.

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The facts appearing from the stated case were as follows.

Robert Howard was appointed in the terms of the Explosives in Coal Mines Order of February 21, 1910, made by the Secretary of State for the Home Department under s. 6 of the Coal Mines Regulation Act, 1896, to act as one of the shot-firers in the section of the mine in which the appellant worked, and was so acting at the date of the accident. The said Order was duly posted at the pit-head. The appellant was not authorized to act as shot-firer. The shots in this pit were fired by means of an electrical apparatus.

The method of firing a shot was (1.) to place the detonator in the hole prepared by the miner and to stem it, (2.) to connect the detonator wire to the cable, (3.) to connect the cable to the electric battery, and (4.) to turn the handle on the battery. The placing of the detonator in the hole and stemming of the charge were always done by the miner, not by the shot-firer. The rest of the operation, under the Explosives in Coal Mines Order, was the duty of the shot-firer. It was part of the appellant's duty to bore a hole for each shot and to charge the shot-hole and stem the shot, and under s. 2 (*e*) of the said Order it was the duty of the shot-firer to couple up the cable (which conveyed the electric current) to the charge, and to do this before coupling the cable to the firing apparatus. It was also his duty to himself couple the cable to the firing apparatus, and before doing so to see that all persons in the vicinity had taken proper shelter.

Three or four days after the appellant commenced work in the section, Howard shewed him how to connect the detonator wire (which was a short wire running down the middle of the shot and projecting a short distance beyond the shot-hole) to the cable, and asked him to do this part of the work. From that time until the date of the accident the appellant was in the habit of making this connection after the charge was stemmed, and this practice was common, but not universal, among the miners in that section during Howard's shift, although no such practice was proved so far as the other shot-firers in the pit were concerned, and the practice was unknown to the management. The rest of the work was done by the shot-firer.

On June 28, 1912, the appellant had prepared a hole for blasting and sent for Howard, who brought the detonator and firing equipment. Howard did not go forward to the face, but remained at a point about thirty feet therefrom round a corner from and out of sight of the point where the shot was. He gave the detonator and the end of the cable to the appellant and proceeded to get ready the rest of the apparatus and repair some damage which had been done to the cable. He did not ask the appellant to connect the shot with the cable, but he gave him the detonator and the cable for that purpose. The appellant put the charge in the hole, stemmed it, then connected the wire of the shot to the cable, and was proceeding to go to a place of safety when the charge was fired by Howard, and the appellant was seriously and permanently injured, his left arm as a result having to be amputated below the elbow. The connecting of the detonator wire with the cable took less than a minute, and the appellant had just turned to go when the charge was fired by the shot-firer. The latter, who was at the other end of the cable about thirty feet away, heard a shout, "Right; fire away," which he thought came from the appellant, but it was in fact from a neighbouring miner, and was addressed to that miner's drawer, who had informed him that a shot was to be fired in their vicinity. The rapidity with which the explosion followed the connecting of the cable to the detonator wire shewed that the cable had been connected to the battery before it was connected to the charge.

The appellant was entitled to be at his working place at the moment when Howard fired the shot, and the cause of the accident was Howard's connecting the cable to the battery before the cable was connected to the charge, and before seeing that all persons in the vicinity had taken proper shelter (which act was in breach of said Explosives in Coal Mines Order), and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter. The act of Howard in allowing the appellant to connect the cable to the charge was also a breach of said Order, and the appellant was not acting in the course of his employment in doing so, but this was not the cause of the accident, although the shot would not have gone off

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unless the cable had been connected to the charge either by the appellant or Howard.

On these facts the arbitrator found that the appellant sustained personal injury by accident arising out of and in the course of his employment with the respondents and made an award in his favour.

The question of law for the opinion of the Court was whether there was evidence upon which it could competently be so found.

The Second Division (Lord Dundas, Lord Salvesen, and Lord Guthrie) answered this question in the negative and recalled the award of the arbitrator.

1914. March 30. *The Lord Advocate* (*the Right Hon. R. Munro, K.C.*) and the *Hon. Alexander Shaw*, for the appellants. *Kerr* v. *William Baird & Co.* (1), on which the Second Division relied, is distinguishable because in that case the miner took upon himself the whole duty of the shot-firer and the accident was the direct result of his own act. Here the act of connecting the charge with the cable was closely allied to the ordinary work which confessedly the appellant had to do, and the act was done on the invitation of the shot-firer, who was in charge of the whole operation. It is not every slight divergence which is fatal to a claim for compensation. The arbitrator has found that the appellant had a right to be where he was. This, therefore, is not the case of a man invading a new territory. The proximate cause of the accident was not the connecting of the charge with the cable, but the turning of the handle by the shot-firer. The appellant was absolved from all consideration of the question when the shot was to be fired; he was entitled to be where he was until he was warned, and he was not warned. Even assuming that he had temporarily quitted his employment in making this connection he had resumed it before the accident happened. The mere fixing of a piece of dead wire to the cable was an act which was not inherently dangerous and was incapable of itself causing the explosion, and the accident was due to a chain of subsequent circumstances.

(1) 1911 S. C. 701.

[LORD SHAW OF DUNFERMLINE referred to *Barnes* v. *Nunnery Colliery Co.* (1)]

[They also referred to *Moore* v. *Manchester Liners* (2); *Plumb* v. *Cobden Flour Mills Co.* (3); *Conway* v. *Pumpherston Oil Co.* (4); *Whitehead* v. *Reader*. (5)]

The Solicitor-General for Scotland (*T. B. Morison, K.C.*) and *Harold W. Beveridge*, for the respondents. The appellant's own duties were finished when he had charged the shot-hole, but he then assumed duties which he ought not to have assumed and he remained on the spot because he had assumed those duties. There is no evidence to support the finding of the arbitrator that the appellant was in his proper place. If the workman remains in territory in which he is not entitled to be he is outside the scope of his employment: *Plumb* v. *Cobden Flour Mills Co.* (6) The whole of the waiting in this danger zone, to which the accident was due, was owing to the discharge by the miner of the shot-firer's duties. It is immaterial whether the miner was performing the whole or a part only of the shot-firer's duties. In either case he was travelling outside the sphere of his employment. The question is not whether the shot-firer was to blame, but what was the duty of the miner to his master and whether the accident occurred while he was performing his own duty. The principle of *Kerr* v. *William Baird & Co.* (7) covers this case. The arbitrator confused the cause of the explosion with the cause of the injury by accident, for which alone the appellant was entitled to compensation.

The House took time for consideration.

April 28. LORD DUNEDIN. My Lords, the facts as found by the arbitrator out of which this case arises are as follows. The appellant was a miner in the employment of the respondents. He worked at a working-face where from time to time blasting by means of a shot was necessary. On these occasions the proper procedure is as follows: The miner bores a hole, puts into

(1) [1912] A. C. 44.
(2) [1910] A. C. 498.
(3) *Ante*, p. 62.
(4) 1911 S. C. 660.
(5) [1901] 2 K. B. 48.
(6) *Ante*, p. 62.
(7) 1911 S. C. 701.

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it a detonator which is handed to him by the shot-firer—a duly appointed official—and stems or packs the detonator in the hole. The shot-firer then connects a cable with the detonator wire, which has been left protruding from the stemmed hole. Then proceeding to the other end of the cable, which is at least twenty yards in length, he couples the cable to an electric battery, and then, after seeing that all persons in the vicinity have taken proper shelter, he fires the shot by turning the handle of the electric apparatus.

What actually happened was this. The shot-firer, a man named Howard, in contravention of the regulations, permitted the appellant to connect the detonator wire with the cable. Thereafter, while the appellant was in the act of retiring from the face, Howard, deceived by a voice calling out "Right; fire away," which voice was the voice of another man, and not of the appellant, and without ocularly satisfying himself that the appellant was in safety, fired the shot. The result was that the appellant, who had not yet reached a place of safety, was severely injured.

In the circumstances the arbitrator found that the appellant had been injured by an accident arising out of and in the course of his employment.

An appeal was taken and the learned judges of the Second Division recalled the finding of the arbitrator.

My Lords, I do not think it necessary to make any remarks of a general character upon the phrase in the statute "arising out of the employment," because I did so, with the approval of other members of your Lordships' House, in the very recent case of *Plumb* (1), and I do not wish to repeat what I then said. Nor do I think that there was any divergence of opinion in the judgments of the learned judges in this case from the law as then laid down. Taking the phrase as a test, and not as a definition, it may, I think, be conceded that if the accident was due to the man arrogating to himself duties which he was not called on to perform, and which he had no right to perform, then he was acting out of the sphere of his employment, and the injury by accident did not arise out of his employment. The sole question is, Was this so in this case? or, in other words, What is the true view of the facts?

(1) *Ante*, p. 62.

I regret that I cannot come to the same conclusion as that come to by the learned judges.

I think I can best make my view clear by taking the case of *Kerr* v. *William Baird & Co.* (1) and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself—I mean without the presence or help of the shot-firer at any stage of the proceeding. It was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty—to insert and stem the detonator—and that he did. The next step—the connecting of the detonator wire to the cable—he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident, namely, the connecting of the cable to the battery and the putting the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorized duty by the miner.

It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause sine qua non, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.

It seems to me that the question of fact which has got to be answered is this: Did the injury to the appellant arise out of the illicit and unauthorized action of the appellant? The answer to that, it seems to me, so far as the action of the appellant consisted in coupling the wire, is No. The injury arose from the premature explosion, and that premature explosion was caused by the action of the shot-firer.

The learned counsel for the respondents felt this difficulty, and urged strenuously that the injury by the explosion to the appellant was really due to his, so to speak, lingering in the place of danger, and that this lingering was due to the fact that

(1) 1911 S. C. 701.

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he had taken upon himself the duty of connecting the wire to the cable. If he were right on the facts I think his argument would be sound. But the facts are, in my judgment, as found by the arbitrator, against him. The workman was, I think, under the regulation, quite entitled to stay in the vicinity of his working place till he was cleared out by the action of the shot-firer. As it was, he was in the act of leaving—an act which could only have been protracted for a few seconds by the connecting of the cable—and the whole mischief was caused by the premature action of the shot-firer.

I am, therefore, of opinion that the view of the facts taken by the arbitrator was correct, and that his finding should be restored.

LORD ATKINSON. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. I have had the satisfaction of perusing the judgment which has just been read by my noble and learned friend Lord Dunedin and it exactly expresses my own view.

LORD PARMOOR. My Lords, in an arbitration under the Workmen's Compensation Act, 1906, the arbitrator has found that the appellant is entitled to compensation in respect of injury resulting from an accident arising out of and in course of his employment with the respondents. The Second Division of the Court of Session, upon a stated case, has negatived the appellant's right to hold the award of the arbitrator. The question of law for decision is whether there was evidence before the arbitrator upon which it could be competently found that the appellant sustained an accident arising out of and in the course of his employment. In answering this question it is necessary, in the first place, to ascertain what are the facts as stated or found by the arbitrator; and, in the second place, to determine whether to the facts so stated or so found the arbitrator has rightly applied the provisions of the Workmen's Compensation Act.

The appellant was a miner in the employ of the respondents who suffered serious and permanent injury from the firing of a shot in the mine. When it was intended to fire a shot in the mine, the appellant as part of his ordinary employment would

bore, charge, and stem the hole. In the present case he further attached the cable to the charge. In so doing he clearly acted outside the sphere of his employment, and in direct contravention of an Order of February 22, 1910, made by the Secretary of State for the Home Department, under s. 6 of the Coal Mines Regulation Act, 1896. Under this Order a shot-firer had been properly appointed, whose duty it was to attach the cable to the charge, and to do so before coupling the cable to the firing apparatus. The shot-firer did not attach the cable to the charge and, before the cable was attached to the charge, it had been coupled to the firing apparatus. There is a further provision in the Order that the shot-firer before firing a shot shall see that all persons in the vicinity have taken proper shelter. In this instance the shot-firer heard a shout, "Right; fire away!" which he thought came from the appellant, but was in fact from a neighbouring miner, and addressed to that miner's drawer, who had informed him that a shot was to be fired in the vicinity. The shot was then fired. The appellant had not taken proper shelter and was seriously injured.

The arbitrator has found, on the evidence before him, that the cause of the accident was the connecting of the cable to the battery by the shot-firer before the cable was connected to the charge, and before seeing that all persons in the vicinity had taken proper shelter, and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter, and that at the time when the shot was fired the appellant was entitled to be at his working place, and was proceeding to go to a place of safety.

The further consideration is, whether on this conclusion of fact it was competent for the arbitrator to award compensation under the Workmen's Compensation Act, 1906; or, in other words, whether it was competent for the arbitrator to find that when the appellant suffered the injury on which he based his claim to compensation he was doing some act arising out of or in the course of his employment. It is not seriously denied that the accident happened in the course of the employment of the appellant as a miner by the respondents. The real argument urged on behalf of the respondents is that the accident did not arise out of the employment of the appellant as a miner. If,

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however, the finding of the arbitrator is accepted, that the appellant was injured from the firing of a shot, while proceeding to a place of safety, it appears to be impossible to maintain that the accident which caused the injury did not arise out of the course of his employment as a miner, and no such argument was directly advanced.

The argument for the respondents, when closely considered, is, in reality, based on a criticism of the finding of the arbitrator. It is said that the appellant in attaching the cable to the charge was doing something which he was never employed to do and which he was prohibited from doing at all. No doubt this is so, and if the accident had happened while the appellant was engaged in work outside the sphere of his employment, and which he was prohibited from doing at all, it would not have been competent for the arbitrator to award compensation either on principle or without contravening the authority of decided cases. The answer is that the arbitrator has negatived any such conclusion on the evidence before him, and that this finding was within his competence.

In my opinion the question of law should be answered in the affirmative and the appeal allowed.

LORD DUNEDIN. My Lords, my noble and learned friend Lord Kinnear desires me to say that he concurs in the judgment about to be pronounced.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and award of the sheriff-substitute of Fife and Kinross restored: The respondents to pay the costs in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, April 28, 1914.

Agents for appellant: *Walker, Son & Field, for Macbeth, Macbain & Currie, Solicitors, Dunfermline, and D. R. Tullo, S.S.C., Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Solicitor, Glasgow, and Wallace & Begg, W.S., Edinburgh.*

[HOUSE OF LORDS.]

LLOYD (BY HIS NEXT FRIEND) . . . . . APPELLANT;

AND

POWELL DUFFRYN STEAM COAL COMPANY, LIMITED . . . . . RESPONDENTS.

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1914
April 6.

Employer and Workman—Compensation—Posthumous Illegitimate Child—Dependant—Evidence—Admissibility—Statements of Deceased—Acknowledgment of Paternity—Promise to marry—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

Upon a claim for compensation under the Workmen's Compensation Act, 1906, by a posthumous illegitimate child as a dependant of its putative father, who was killed by accident arising out of and in the course of his employment with the respondents, evidence of statements made by the deceased to the effect that he acknowledged the paternity of the child and that he intended to marry the mother before the child was born is admissible both on the issue of paternity and on the issue of dependency, as evidence of the state of mind of the deceased in relation to the child.

Semble per Lord Shaw of Dunfermline: The fact of dependency, whether in the case of legitimate or illegitimate children, and whether born or to be born, does not necessarily rest upon any promise of support by the father.

Decision of the Court of Appeal [1913] 2 K. B. 130 reversed.

APPEAL from an order of the Court of Appeal setting aside an award of the county court judge of Monmouthshire sitting as arbitrator under the Workmen's Compensation Act. (1)

The appellant, Thomas Lloyd, an infant, by his mother, Alice Lloyd, as his next friend, claimed compensation from the respondents in respect of the death of Frank Whittall, who was killed by accident arising out of and in the course of his employment at the respondents' colliery on October 17, 1911. The appellant was born on May 15, 1912.

By the particulars of claim it was alleged that the appellant was the illegitimate child of the deceased, and he claimed the sum of 127*l.* 8*s.* as a partial dependant of the deceased.

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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At the hearing of the arbitration Alice Lloyd stated in evidence that she met the deceased in December, 1910, and used to go out with him as his sweetheart; that in July and August, 1911, intercourse took place between them; that on the Sunday week before he was killed she went for a walk with him and was crying because she knew of her condition. She then continued: "He told me not to worry because we would be married in plenty of time. He had wanted to marry me before I got into that condition. I told him the child would be born in May. It was born on the 15th of May."

Mrs. Matilda Evans, at whose house deceased lodged, stated that she had a conversation with him the night before he was killed; that he said that Alice Lloyd had told him some things that troubled him very much, but that it did not matter because he would marry her soon enough; that she asked him Did he mean it? and that he said Yes, he would marry her before May. He looked vexed.

William Jones said: "Whittall was my bedmate. He was away from lodging from October 7—10. After he came back I had a conversation with him. He said he was afraid Miss Lloyd was in trouble—it was a case of getting married. He asked if I knew where he could get a house as I was working on the cottages."—It was admitted that Jones was then at work on some cottages which were being built.—"He wanted to work as much as he could now to provide a home for himself and Miss Lloyd."

Counsel for the respondents objected to the admission of the evidence of statements alleged to have been made by the deceased, but the county court judge held that the evidence was admissible as being evidence of statements by the deceased against interest.

The county court judge found that the appellant was the illegitimate son of Alice Lloyd by Frank Whittall and, notwithstanding the form of the pleadings, made an award in his favour of 221*l.* on the footing of total dependency.

The Court of Appeal (Cozens-Hardy M.R., Buckley and Hamilton L.JJ.) set aside the award on the ground that the evidence to which objection was taken was wrongly admitted

inasmuch as the alleged statements were not shewn to be against interest.

Upon the appeal to this House counsel for the appellant did not claim more than 127*l.* 8*s.*, the amount claimed in the particulars.

1914. Jan. 29, 30. *Sankey, K.C.*, and *Hugh Jones*, for the appellant. 1. The statements made by the deceased of his intention to marry the mother and support the child are admissible in evidence, not on the ground that they are statements made against interest, but, having regard to the relationship between the parties, as part of the deceased's behaviour. Words in such a case are equivalent to acts. Hamilton L.J.'s judgment, though a brilliant contribution to the law upon the admissibility of evidence of statements by a deceased person against interest, is not relevant to this case. 2. Apart from these statements there is still sufficient evidence of dependency. The definition of "dependants" in s. 13 of the Act of 1906 includes illegitimate children. That is to say, the Legislature has made legitimacy immaterial upon the question of dependency. The fact that the father died before the birth of the child makes no difference. The language of the Act, no doubt, is suitable to existing persons, but by a fiction of our law, where it is for the benefit of the child, a child en ventre sa mère is taken to be born, and the language must be adapted to that case; the birth must be antedated and the dependency anticipated. Accordingly it has been held by the Court of Appeal and by this House that the Act applies to posthumous children, whether legitimate or illegitimate: *Williams* v. *Ocean Coal Co.* (1); *Schofield* v. *Orrell Colliery Co.* (2) The latter case is on all fours with the present except that no objection was there taken to the admissibility of the evidence. Although the legal obligation of a father to maintain his child is not conclusive upon the question of dependency, yet the existence of that obligation and the probability that it will be discharged are matters to be taken into account in regard to that question: per Lord Atkinson in

(1) [1907] 2 K. B. 422.
(2) [1909] 1 K. B. 178; [1909] A. C. 433.

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New Monckton Collieries v. *Keeling.* (1) Those observations apply equally to the moral obligation of a father to support his illegitimate child. Looking at the probabilities of the case, in view of all the circumstances, this child might reasonably have counted upon assistance from the earnings of the father had he survived and is therefore properly found to be a dependant.

Scott Fox, K.C., and *Albert Parsons*, for the respondents. The Act of 1906 defines "dependants" as such members of the workman's family as were dependent upon the earnings of the workman at the time of his death or would but for the incapacity due to the accident have been so dependent. That second limb was put in merely to meet the case of a child who was supported at the time of the accident but had ceased to be so supported at the time of the death by reason of the intervening incapacity. The Act then goes on to define the family, i.e., the class of possible dependants, and says that it shall include illegitimate children. But the first condition of dependency is that the child, whether legitimate or illegitimate, shall have been in fact supported at the time of the death or of the accident causing the death. The statutory test is actual dependency in fact, and any qualification upon that has been introduced by decision. If any extension of the definition of dependants is to be allowed, at least the Court must have before it sufficient facts to induce it to say that the claimant had the practical right to expect support, and that right must be proved not by expressions of intention but by overt acts on the part of the father. The respondents do not contest the paternity of the child, but they submit that the evidence of the statement of the deceased that he intended to marry the girl is inadmissible and irrelevant: *Reg.* v. *Petcherini* (2); *Reg.* v. *Wainwright* (3); *Thomas* v. *Connell.* (4) By the law of England the statements of a deceased person are admissible on three grounds, none of which are applicable to the present case: (1.) as being against interest (to which substantially the whole of the argument in the Court of Appeal was directed), (2.) as being made in the discharge of a duty, and

(1) [1911] A. C. 648, at p. 653.
(2) (1856) 7 Cox, C. C. 79.
(3) (1875) 13 Cox, C. C. 171.
(4) (1838) 4 M. & W. 267, at p. 269.

(3.) as part of the res gestæ, and on those grounds only. *Schofield's Case* (1) is distinguishable because there the deceased paid money to the girl for the publication of the banns and people were invited to the wedding, whereas in this case the statements of the deceased were supported by no overt act. The seduction of a girl under a promise of marriage cannot be sufficient to justify the arbitrator in finding that there was a reasonable expectation of support from the father on the part of the child.

Sankey, K.C., replied.

The House took time for consideration.

April 6. EARL LOREBURN. (2) My Lords, this is an appeal under the Workmen's Compensation Act. The material facts are that the infant applicant is the posthumous illegitimate child of the deceased workman, who was killed by accident arising out of and in the course of his employment. An award was made for the applicant, but the Court of Appeal reversed this decision upon the ground that the learned judge had received evidence which was inadmissible.

Now the evidence thus rejected consisted of statements made by the deceased in which he acknowledged the paternity of the child and promised to marry the mother before the child should be born. In the Court of Appeal the admission of this evidence was justified upon one ground alone, namely, that it was evidence given by a deceased person against interest. It is very unfortunate and, indeed, unfair to any Court that the true point should not be taken before it. But I do not think that we ought to exclude the true point when it comes before us, though we have been deprived of the invaluable assistance which we should have gained from learning the opinions upon it of the Court of Appeal. In my view the evidence was admissible upon grounds not urged upon that Court. The argument which failed there was not renewed here, and I do not desire to express any dissent from the opinion expressed by the Court of Appeal.

In considering whether the evidence was admissible or not

(1) [1909] 1 K. B. 178; [1909] A. C. 433. (2) Read by Lord Dunedin.

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the first question is, What were the issues? Paternity was one issue. Whether the child was posthumous or illegitimate or both is immaterial. I think the evidence was properly allowed on the issue of paternity. If paternity has been established, the next issue is dependency. It is now clear that the existence of a legal duty upon the deceased workman to maintain wife or child out of his earnings, where such duty exists, is not conclusive proof of dependency, but it is a strong element, and in my opinion may be of itself sufficient.

The evidence in question went to shew that if the father had not prematurely died this child would have been born legitimate, and its father would have been legally bound to maintain it, which is a strong fact to prove dependency. Accordingly the evidence was, in my opinion, admissible upon that ground also. Further, it went to shew that the child would need, and would have received, its father's support. On that ground too I think it was admissible.

Another and quite distinct point might arise. Is not the moral duty of a father to maintain his illegitimate child an element in proof of dependency which may be of itself sufficient to prove it, with or without the liability to an affiliation order, just as the legal duty is an element in the case of a legitimate child? I do not express an opinion because this case was argued throughout upon the admissibility of evidence, and the point ought not to be decided without full argument. But the observations of my noble and learned friend Lord Shaw require the most serious consideration, if I may be allowed to say so.

I am, therefore, of opinion that the award ought to be restored, but with one modification. The county court judge awarded as for total dependency, whereas the claim was for a smaller sum, 127*l.* 8*s.*, as for dependency in part. The award must be reduced to the sum claimed.

Lord Atkinson. My Lords, in this case it is not disputed that Frank Whittall, a workman, was on October 17, 1911, while in the employment of the respondent company, killed by an accident arising out of and in the course of that employment. The claimant, Thomas Lloyd, the illegitimate son of Alice Lloyd,

was born on May 15, 1912, within four days of seven months after Whittall's death.

A claim is made on this child's behalf for compensation under the Workmen's Compensation Act of 1906, on the ground that Frank Whittall was his father, and that at the time of the latter's death he (the applicant) was within the meaning of this statute dependent upon his father. It has already been decided by this House on this statute, in *Orrell Colliery Co.* v. *Schofield* (1), that an illegitimate child en ventre sa mère at the time of its father's death may, when it subsequently comes into existence, be held to have been dependent upon its father at the time of the latter's death. The fact, therefore, that this child was a posthumous child is not per se a bar to its claim for compensation if it should be otherwise entitled to it.

Your Lordships' House has also decided, in *New Monckton Collieries* v. *Keeling* (2), that dependency is a question of fact. And that on this issue of fact the existence of a legal obligation upon a workman to support and maintain a wife or child, though not per se conclusive as a matter of law, is in all cases an element to be taken into consideration by the tribunal that has to decide that issue, and might, in many cases, be an almost conclusive piece of evidence. From these authorities it necessarily follows, in my view, that if a man, with full knowledge of the pregnancy of a woman with whom he has had sexual intercourse, becomes, during her pregnancy, engaged to be married to her, the fact of that contract having been entered into, though not carried out, is a most powerful piece of evidence on both the issues of fact, namely, the dependency and the paternity of the child, because by the marriage a relation would be created from which the presumption of the legitimacy of the child would arise, and by reason of that legitimacy the legal liability of the father to support and maintain the child would result. If the contract should be terminated the fact that it was made would be evidence on the second issue. I further think that the mere proposal of marriage made by a man under such circumstances, whether accepted or not, would be admissible evidence, certainly on the issue of paternity, though possibly not on that of dependency.

(1) [1909] A. C. 433. (2) [1911] A. C. 648.

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Now the question of paternity—an issue of fact—and the question of dependency—another issue of fact—are the only issues of fact raised in this case. By the marriage of the parents of a child, even one day before its birth, the presumption of legitimacy is created: *Gardner* v. *Gardner*. (1) The head-note to that case runs thus: "Where, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy) hurry on their marriage to prevent or to mitigate scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity of that child is next to insuperable." The Lord Chancellor (Lord Cairns) added: "The presumption is not a presumptio juris et de jure, but a presumption of fact."

This presumption is, I think, founded on the great improbability that any man with the ordinary feelings of a man would marry a woman whom he believed, or knew, to be pregnant if he did not believe he was the father of her child.

The proposal to marry and the acceptance of it may, of course, be made by word of mouth; but the making and the acceptance of it are acts, matters of conduct, and strong pieces of evidence on the issue of paternity, inasmuch as they shew the character in which the parties regarded the child en ventre sa mère, and desired to treat it. The considerations which apply to a suit in which the issue of fact is the legitimacy of a child must obviously apply to a litigation like the present, in which one of the issues of fact is its paternity. In *Morris* v. *Davies* (2) the matter in issue was the legitimacy of a child born in wedlock. The statement of the deceased paramour of the mother to the effect that he objected to the child being brought up to a particular trade, and that he would clothe and provide for it, was admitted in evidence as proof of a matter of conduct, shewing the character in which he regarded the child.

Again, in the case of the *Aylesford Peerage* (3), where the question in issue was also the legitimacy of a child born in wedlock, the letters of both the mother of the child, Lady Aylesford, and of her paramour, both alive at the date of the

(1) (1877) 2 App. Cas. 723. (2) (1837) 5 Cl. & F. 163.
(3) (1885) 11 App. Cas. 1.

hearing, were given in evidence as proofs of matters of conduct shewing that they both regarded and treated this child as the offspring of their adulterous intercourse, and were, therefore, evidence to rebut the presumption of legitimacy.

It would appear to me, therefore, that on this question of paternity it is impossible to distinguish, on principle, the statements made by the deceased to Alice Lloyd, Mrs. Matilda Evans, and William Jones, from the statements contained in the letters received in evidence in the *Aylesford Case.* (1) No doubt Alice Lloyd proved the paternity of the child, and her evidence was not impeached; the county court judge believed it; but of course that circumstance cannot make additional evidence on the same point inadmissible. To treat the statements made by the deceased as statements made by a deceased person against his pecuniary interest, and therefore, though hearsay, proof of the facts stated, is wholly to mistake their true character and significance. This significance consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the child of whom Alice Lloyd was pregnant.

As I have already stated, I think the entering by these two people into an engagement to marry after the woman's condition had become known would, for the reasons I have mentioned, be admissible evidence on both issues, but if so, evidence of corroboration of the promise to marry such as would make the marriage contract enforceable in law would also be admissible.

Now, how does the evidence stand on these two questions, first, of the fact of an engagement to marry having been made, and second, of the corroboration of it? Alice Lloyd might have been asked, in the course of her examination-in-chief, whether she was engaged to be married to the deceased, and if so, when and under what circumstances the engagement took place. And if she had replied, "Yes, we were engaged before I became pregnant," or "immediately on my informing him I was pregnant, and would be confined in May, 1912," no objection whatever could have been taken on the ground of inadmissibility to these questions or the answers to them. This was apparently the

(1) 11 App. Cas. 1.

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course followed in *Schofield's Case*. (1) It was there proved that when the girl discovered she was with child, she and Schofield, the deceased workman, became engaged to be married; that Schofield acknowledged the paternity of the child in the presence of the girl's mother, and told her that he did not intend the child to be a chance child, but that he would marry the girl and keep her. It did not apparently occur to any person engaged in that case to suggest that Schofield's proposal to marry, or his admission of paternity, or his statement of his intentions in reference to the child, were not matters of conduct shewing his attitude towards and mode of regarding and treating the fact of this girl's pregnancy, but were mere statements of a deceased person not made against his pecuniary interest, and therefore inadmissible. Well, the course apparently followed in *Schofield's Case* (1) was not pursued in the present case. On the contrary, the gentleman who appeared for the applicant resolutely abstained from putting specifically to Alice Lloyd the most important question which, as the fact stood, he could have put to her, which question, moreover, it is highly probable, from her evidence, she would have answered in the affirmative, namely, whether she was engaged to the deceased man or not. Fortunately, however, for the interest of justice, the woman has given evidence, the fair inference to be deduced from which is, I think, this, that she and Whittall were engaged to be married. The evidence runs as follows:—

"He came to see me Sunday week before he was killed. I went for a walk with him and I was crying because I knew of my condition.

"He told me not to worry because we would be married in plenty of time. He had wanted to marry me before I got into that condition.

"I told him the child would be born in May. It was born on the 15th of May."

There was no suggestion that Alice Lloyd was not ready and willing to marry the deceased, and her evidence would appear to me to be more consistent with the assumption that he and she were before this interview engaged to be married, but that the time

(1) [1909] 1 K. B. 178; [1909] A. C. 433.

when the marriage was to take place had not been fixed, rather than with any other assumption, and that when he saw her in distress by reason of her condition he sought to console her by assuring her that the engagement theretofore existing would be carried out before the child was born. I think it was quite competent for the county court judge to have from this evidence drawn the inference that these two people had become engaged before this interview.

Now as to the evidence of corroboration.

It consists of the statements made, acts done, and feelings displayed by the deceased, as deposed to by Mrs. Matilda Evans and William Jones. The first witness says that the night before Whittall's death he looked vexed. I presume that means troubled in mind. That he said that Alice Lloyd had told him something which troubled him very much, but that it did not matter because he would marry her soon enough. This statement would appear to me to suggest that he and Alice Lloyd had arranged to get married, and would get married in time, rather than that he merely intended to make thereafter a proposal of marriage to her.

To Jones he said he was afraid Miss Lloyd was in trouble, that it was a case of "getting married." That he asked the witness where he could get a house, and the witness further stated the deceased wanted to work as much as he could to provide a house for himself and Miss Lloyd. The same remark applies to this evidence as to that of Mrs. Evans. It suggests, I think, an intention to carry out an arrangement already made, rather than an intention to make thereafter a proposal to marry.

In *Bessela* v. *Stern* (1) the plaintiff had been seduced by the defendant, and was pregnant. The corroboration held on appeal to be sufficient was the evidence of the sister of the plaintiff. This witness stated that in May, 1875, she saw the plaintiff was in the family way, that she went to see the defendant, and that she said, "What have you done? You've got her into such disgrace. What do you mean?" That he said he would marry her and give her anything, but she must not expose him. That she said, "I hope you'll do so." That in July, 1875, she went to the

(1) (1877) 2 C. P. D. 265.

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defendant's office; he gave her 1*l.* to give her sister. That she said, "What are you intending to do?" That he said, "There's plenty of time to talk of that when that thing is born." That she (the witness) was at Mrs. Balmer's house (where the plaintiff was confined) shortly after the birth of the child. That defendant came, and went into the parlour where her sister was. That she could hear what they were saying. That her sister said, "You always promised to marry me, and you don't keep your word." He said he would give her some money to go away.

Grove and Denman JJ. held that this evidence did not amount to sufficient corroboration. That decision was reversed on appeal by Cockburn C.J., Bramwell and Brett L.JJ., sitting in the Court of Appeal, who held that the conversation overheard was sufficient evidence of corroboration to require the case to be left to the jury, on the ground, apparently, that the defendant's omission to make any reply to the plaintiff's assertion might be held by a jury to amount to an admission of the truth of that assertion, Brett L.J., as he then was, stating that it was not necessary that the corroborative evidence should prove a promise to marry, that all that was wanted was a corroboration of the promise. It would appear to me that the statement of the deceased deposed to by Mrs. Evans and Jones is quite as strong a corroboration of the promise to marry as the silence of the defendant in *Bessela* v. *Stern.* (1)

In my view, therefore, all the evidence held by the Court of Appeal to be inadmissible was admissible on one or both of the two issues of fact raised in the case, namely, paternity and dependency. I further think that if what took place between Alice Lloyd and the deceased at their last interview only amounted to a proposal to marry, it was still evidence on the question of the paternity of the child. It is admitted, as I understand, that if this evidence was admissible, any reasonable man might have come to the conclusion at which the county court judge arrived on the whole of the evidence and that the claimant would be entitled to recover the amount claimed.

I think, however, that the amendment he made was

(1) 2 C. P. D. 265.

indefensible, and should not be allowed to stand, on the ground that the respondents got no opportunity of shewing that the child was not wholly dependent upon his deceased father, the claim having been framed on partial dependency only. The finding of the county court judge was in the Court of Appeal assailed mainly, if not entirely, on the ground that he had admitted in evidence the statements of the deceased deposed to by Alice Lloyd, Mrs. Evans, and Jones as statements made by the deceased against his own pecuniary interests, and therefore evidence of the facts stated. The Court of Appeal held that these statements of the deceased were not of that character.

I thoroughly concur in that conclusion. I think, however, that these statements were admissible on the other grounds I have mentioned. I am, therefore, of opinion that the appeal should be allowed, and that the order and decree of the county court should be varied by reducing the amount awarded to that originally claimed, and should be affirmed as amended. The appellant is, I think, entitled to his costs of the appeal in the Court of Appeal and in this House.

Lord Shaw of Dunfermline. My Lords, I concur in the judgment proposed. But as I have reached this conclusion on grounds which are somewhat different from those of some of your Lordships, I desire to explain—and can do so briefly—what is my own point of view.

After the cases of the *Orrell Colliery Co.* (1), the *New Monckton Colliery Co.* (2), and *Potts* v. *Niddrie and Benhar Coal Co.* (3), there can be no doubt of the law: (1.) that dependency is a matter of fact, and whether it is total or partial is also a matter of fact; and (2.) that a posthumous child may be a dependant in the sense of the Workmen's Compensation Act.

As to the third point, namely, whether illegitimate children can be included within the category of dependants, that, in my view, is definitely settled by the statute itself. Under s. 13 "'dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of

(1) [1909] A. C. 433. (2) [1911] A. C. 648.
(3) [1913] A. C. 531.

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the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent . . . . of an illegitimate child, leaves such a child so dependent upon his earnings . . . . shall include such an illegitimate child."

My Lords, with the greatest respect, I think that those statutory words have not had sufficient importance attached to them, and that accordingly a good deal of the discussion was misplaced. So far as I am concerned, I cannot see my way, in face of this positive provision of this statute, to exclude from the category of dependants every illegitimate child with regard to whom it is not established that the father was meaning to provide for it, or had come under obligations or made promises in that particular. I humbly think that what the statute meant was to include all children of the workman, whether legitimate or illegitimate, within the category of possible dependants. It would not appear to me to have any bearing upon the case of a legitimate child to make the fact of its dependency in any case rest upon whether the father had made promises that his children born, or about to be born, would be supported by him: and I do not see why, when illegitimate children are included within the category of possible dependants as well as legitimate children, such an inquiry as to promises or undertakings by the father comes into place in their case. The statute, in my view, has said that the workman's family and his illegitimate children shall be within the category of possible dependants, and that being so, in my view, what remains to ask are two questions of fact, and two alone, namely, Was the workman the father? And secondly, Was the child, legitimate or illegitimate, in fact dependent? But his promises or undertakings or acknowledgments do not appear to be a necessary part of any inquiry in regard to the true and only relevant subjects, which are the two which I have mentioned. And the paternity and the dependency may be quite conclusively established, although there were no such promises, undertakings or acknowledgments.

It was said in argument that some kind of limitation ought to be put on the class of illegitimate children, otherwise bogus claims might be numerous. The county court judges will no

doubt take care of that, and I for myself do not doubt that they will demand clear proof of paternity. But if the paternity be proved, then the statute, for reasons of State, has included, along with legitimate, illegitimate children.

As to the second fact, namely, dependency itself, one can figure cases with regard to both classes of children; cases, for instance, where dependency is not established because the son or daughter is earning his or her own living, has lived a separate life from the father, has a competence acquired from the mother, or has a fortune left to it by the father. In the case of illegitimate children suitable and full provision is sometimes made even before their birth. All these illustrations shew that, whether a child be legitimate or illegitimate, the question of dependency is just the old question of fact.

And with regard to both classes of children, I do not think the matter of fact is either settled or distorted by inquiring whether there was a direct right of action for support or not. For the reason I am about to give, I should be sorry to think that, in the construction of a statute which applies to the whole of the United Kingdom, the form of procedure for the enforcement of the parental obligation had any such bearing on the question to be determined.

In England, the procedure in the case of the legitimate children may be more direct than in the case of the illegitimate; but whether directly or circuitously made effectual, the obligation of the father to contribute towards the maintenance of the illegitimate child is there; and it is there in all those cases in which the child is without independent means. As it humbly appears to me, the express extension and application of the statute to the case of dependent illegitimate children does not necessarily rest upon anything said or promised by the father, nor upon whether his obligation in relief of the child's dependency was accompanied by undertakings of maintenance by him.

And in Scotland the same difficulty or circuity of procedure does not occur, and the action of an illegitimate son or daughter is a direct action for aliment: while as to the obligation, there is no doubt whatsoever. In *Clarke* v. *Carfin Coal Co.* (1) a full

(1) (1891) 18 R. (H. L.) 63, at p. 68.

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examination was made by Lord Watson of the institutional writings and of recorded cases on the subject. "They settle," said he, "in conformity with the text of Bankton and Erskine, that there is a joint obligation upon both parents to maintain their natural child until it becomes capable of earning its own livelihood; and that the inability of either parent casts the whole liability on the other." The inclusion or exclusion, the extension or limitation of the obligation to support illegitimate children is never complicated by any consideration of the question whether the father had made promises or arrangements to support his offspring. It would be very regrettable if this Imperial statute should have its words applied in different senses north and south of the Tweed. But I do not see any reason so to construe it. And for the same reasons I think those elements of the evidence to which I have referred are irrelevant.

As to the paternity itself, it does not seem to me that there are any grounds for disturbing the decision of the learned judge. All the statements by the father, importing his knowledge of the condition of the mother, his intentions to set up a household, and the like, appear to me to be legitimate matter of proof on the point of paternity. In a question of status, I am of opinion that such statements, proved to have been made at the time and in the circumstances such as occurred in the present case, are part of the res gestæ equally with actual contracts entered into by the deceased or conduct apart from words, both of which contracts and conduct could undoubtedly have been proved. I agree with the view that statements made at the time are, in this question of status, similarly admissible evidence. I cannot, speaking for myself, hold that they can be excluded because of the English rule as to statements not made against interest. I observe the tendency to confine the word "interest" in that connection to pecuniary interest. Statements of the kind made in this case do not appear to me to be ruled out by any such principle, and I do not think that those parts of the judgments of the Court below which imply this can be supported. The statements of a deceased man with regard to paternity of a child must no doubt be carefully weighed, but I do not know of any principle which would deny their admissibility quantum valeant. I should add that in

the present case, even apart from these statements, it would not appear to me doubtful that the learned county court judge had material for arriving at the conclusion which he reached.

In my opinion the appeal should be allowed with costs to the appellant in this House and in the Court below.

LORD MOULTON. (1) My Lords, I agree, and in my opinion the result of the appeal to the Court of Appeal would have been different had the argument before that Court taken the same course as the argument before your Lordships.

The facts of the case are very simple. The appellant is the son of Alice Lloyd, an unmarried woman. He was born about seven months after the death of the workman, Frank Whittall, who, it is admitted, on the 17th day of October, 1911, while in the employ of the respondent company, was killed by an accident arising out of and in the course of his employment by them. At the hearing of the claim made on behalf of the infant, on the ground that he was a posthumous illegitimate son of Frank Whittall, the mother, Alice Lloyd, gave evidence which was accepted in its entirety by the county court judge. That evidence proved that Frank Whittall had been keeping company with her for a few months before his death; that he was, in fact, the father of the child; that early in October he learnt from her that she was with child and expected that the child would be born in the following May; and that he promised to marry her in time to make the child legitimate. Two other witnesses were called on behalf of the claimant. The one was William Jones, the bedmate of the deceased, who in the early part of October, 1911, was working on some cottages that were in process of being built. He proved that on the deceased's return from a visit to Alice Lloyd, which corresponded very closely to the date when she informed him of her being with child, the deceased told him the condition she was in, that he was about to marry her, that he now wanted to work as much as he could to provide a home for himself and Alice Lloyd, and that he asked the witness

(1) By inadvertence Lord Moulton's opinion was not read, but on April 7 Viscount Haldane L.C. moved that the opinion should then be handed in and form part of the record.

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if he knew where he could get a house. It is clear from the evidence that this question was in connection with the work witness was doing on cottages probably suitable for the purpose. The other witness was Mrs. Matilda Evans, who kept the lodging-house where Frank Whittall and William Jones lived. She proved a conversation which she had with Frank Whittall on October 16, the night before he was killed. In that conversation he gave her to understand that Alice Lloyd had told him of her condition, that it troubled him very much, but that it did not matter because he would marry her soon enough, and in repeating this statement expressed his intention of marrying her before May, which was the date which Alice Lloyd had assigned for the probable birth of the child.

The county court judge found that the claimant was totally dependent on the deceased and considered himself obliged by the Act to assess the compensation at the full amount of 221*l.*, which was the sum corresponding to total dependency. The claim, however, had been framed on the basis of partial dependency, and the amount therein claimed is 127*l.* 8*s.* There are serious legal difficulties in sustaining the action of the county court judge in going beyond the amount claimed in the arbitration, and counsel for the appellant has wisely restricted his appeal to the amount actually appearing in the claim, so that it is not necessary to deal with the legal questions arising out of the award of the larger sum.

There can be no doubt that if the whole of the testimony given at the hearing was admissible there was abundant justification for the finding of the county court judge in favour of the claimant. By decisions in your Lordships' House it has been established that a child en ventre sa mère at the date of the accident is entitled to claim as though he were a child born at that date, and, further, that there is no distinction between legitimate and illegitimate children excepting so far as the nature of the relationship may affect the weight of the evidence for and against dependency. But though the weight and even the nature of the evidence may be affected by the question of legitimacy or illegitimacy, the issue to be decided is identical, and that issue is for the purposes of the present case adequately

expressed by the phrase used in the very thoughtful judgment of the county court judge in this case, namely, "Was there a reasonable anticipation that the applicant would be maintained by his father Whittall?"

The sole question, therefore, is as to the admissibility of the evidence tendered. Objection was taken at the trial to the evidence given by Alice Lloyd as to the promise of marriage, and to the evidence of the conversations of the deceased, Frank Whittall, with Mrs. Evans and William Jones. The learned county court judge admitted this evidence on the ground that the statements of the deceased were admissions against interest by a deceased man. The able judgment of Lord Sumner (then Hamilton L.J.) in the Court of Appeal disposes of this contention, and the argument before your Lordships was based on a wholly different ground, namely, that the state of mind of the deceased, so far as it bore on his acceptance of his position as the father of the child and his intention to fulfil his duties as such, was relevant to the issue of dependency, and that the evidence in question was admissible as being proper to determine his state of mind. I am of opinion, my Lords, that on this ground the evidence was admissible.

It can scarcely be contested that the state of mind of the putative father and his intentions with regard to the child are matters relevant to the issue, whether there was a reasonable anticipation that he would support the child when born. It may be that an intention on his part so to do might be implied from the fact of his paternity and his recognition of it. But whether this be so or not, the attitude of mind of the putative father is that from which alone one can draw conclusions as to the greater or less probability of his supporting the child when born, and therefore evidence to prove that attitude of mind must be admissible if it be the proper evidence to establish such a fact. Now, it is well established in English jurisprudence, in accordance with the dictates of common sense, that the words and acts of a person are admissible as evidence of his state of mind. Indeed, they are the only possible evidence on such an issue. It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to

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understand the distinction. Speaking is as much an act as doing.

It must be borne in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence. The testimony of the witnesses is to the act, i.e., to the deceased speaking these words, and it is the speaking of the words which is the matter that is put in evidence and which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay evidence.

The connection between the conversation and the information as to paternity is so close that it is probable that the evidence would be admissible under the head of res gestæ, but its admissibility, on the grounds I have just mentioned, is so clear that it is not necessary to examine this further question.

I am of opinion, therefore, that the appeal should be allowed, and the award made of the sum of 127*l.*, with costs here and in the Court below.

Order of the Court of Appeal reversed and award of the county court judge varied by reducing the amount awarded, namely, 221*l.*, *to the sum of* 127*l.* 8*s.*, *being the amount originally claimed by the appellant, and subject to such variation restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.*

Lords' Journals, April 6, 1914.

Solicitors for appellant: *Ward, Bowie, Porter & Co., for T. J. Thomas, Bargoed.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

[HOUSE OF LORDS.]

EARL FITZWILLIAM . . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE . RESPONDENTS.

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1914
April 6.

Revenue—Reversion Duty—Determination of Lease—Value of Benefit accruing to Lessor—Total Value of Land—Licensed Premises—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 13, 25.

In estimating the total value of land for the purpose of assessing the reversion duty payable under s. 13 of the Finance (1909-10) Act, 1910, on the determination of a lease the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration.

Decision of the Court of Appeal [1913] 2 K. B. 593 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Horridge J. (2)

On November 7, 1861, the then Earl Fitzwilliam, the predecessor of the appellant, leased to John Jackson a piece of land in the parish of Norton, Yorkshire, together with the messuage or tenement which was then or at any time thereafter during the term should be erected on the land, for a term of fifty years from April 6, 1861, at a rent of 4*l.* per annum. A messuage was erected on the land by the lessee, and at some period during the continuance of the lease this messuage became and was at the determination of the lease fully licensed for the sale of intoxicating liquors. The licence was an "old on-licence" within the meaning of the Licensing (Consolidation) Act, 1910. At the determination of the lease on April 5, 1911, the lessees were the Scarborough and Whitby Breweries, Limited.

On June 10, 1911, the appellant leased the same premises to the brewery company for a term of fourteen years from April 6, 1911, at a rent of 29*l.* per annum, and the lease provided that the lessor should pay the proper proportion of the compensation levy in respect of the premises.

* *Present:* EARL LOREBURN (during the argument only), LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1913] 2 K. B. 593. (2) [1913] 1 K. B. 184.

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On the determination of the original lease a demand was made for reversion duty under the Finance (1909-10) Act, 1910, and the question arose whether the licence ought to be included in the total value of the land for the purpose of assessing that duty.

The following figures were agreed by the parties:—

Total value at the time of the original grant of the lease, 120*l.*

Total value at the time of the determination of the lease including the licence, 500*l.*

Total value at the time of the determination of the lease excluding the licence, 300*l.*

It was agreed that none of the deductions in s. 25, sub-s. 3, of the Act applied and that the total value and the gross value were accordingly the same.

The respondents assessed the total value at the determination of the lease at 500*l.* and the value of the benefit accruing to the lessor at 380*l.* (the difference between 500*l.* and 120*l.*), and they demanded duty amounting to 38*l.*

The appellant appealed to a referee, who held that the value of the licence ought not to be included in the total value of the land. The effect of that decision was that the total value of the land was reduced from 500*l.* to 300*l.*, and the value of the benefit accruing to the lessor from 380*l.* to 180*l.*, with the result that the amount of duty payable was 18*l.*

Horridge J. reversed the decision of the referee and restored the assessment of the respondents, and the decision of the learned judge was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Buckley L.J. dissenting).

The arguments upon this appeal were the same as those urged in the Court of Appeal (which are fully reported in [1913] 2 K. B. 593) and it is not thought necessary to repeat them.

1914. Feb. 2. *Ryde*, *K.C.*, and *A. F. Wootten*, for the appellant.

Sir John Simon, *A.-G.*, and *W. Finlay*, for the respondents.

Ryde, *K.C.*, replied.

The following cases were referred to: *Whitley* v. *Challis* (1);

(1) [1892] 1 Ch. 64.

In re Bennett (1); *Laceby* v. *Lacon & Co.* (2); *Inland Revenue Commissioners* v. *Herbert.* (3)

The House took time for consideration.

April 6. LORD ATKINSON. My Lords, the point for decision in this case is a very short and, in my view, on the facts agreed upon, a very simple one.

Earl Fitzwilliam, the appellant, is the owner in fee of a certain house and premises which had been demised under a lease bearing date November 7, 1861, for a term of fifty years from April 6, 1861, at the yearly rent of 4*l.* This lease accordingly terminated on April 6, 1911.

The lessees' interest in the premises had become vested in the Scarborough and Whitby Breweries Company, and they were at the termination of the lease in the occupation of a tenant of the company, who had obtained a licence from the proper authorities entitling him to carry on in them the trade and business of a publican. The licence was current at the expiration of the lease, and was what is called in the Licensing (Consolidation) Act, 1910, an "old" licence.

On the termination of the lease Earl Fitzwilliam, instead of being merely owner of the reversion, became the absolute owner in fee in possession of premises, with all the rights, benefits, privileges, and advantages arising from that ownership.

It is found in the case that the total value of the licensed premises as they stood at the termination of the lease within the meaning of the 25th section of the Finance Act of 1910 was 500*l.* It is admitted that there being none of the fixed charges and other incumbrances mentioned in the 3rd sub-section of that section affecting the premises, their total value as they stood at the termination of the lease was practically their gross value as defined in sub-s. 3 of that section. But that is the market value of the fee of the premises as they stood, with all the rights, benefits, privileges, and advantages which the purchaser would acquire by reason of, and springing out of, the

(1) [1899] 1 Ch. 316. (2) [1899] A. C. 222.
(3) [1913] A. C. 326.

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ownership of the fee. The nature and quantum of the estate and interest acquired by the purchaser are precisely the same as those vested in Earl Fitzwilliam on the termination of the lease. The rights, privileges, and advantages accruing to the Earl by reason of his ownership in fee of these premises under the Licensing Act of 1910 are, if not greater, certainly not less than those which the purchase of that fee would secure to the purchaser.

The benefit, therefore, which accrued to Earl Fitzwilliam on the termination of the lease is precisely the same, practically, as that which would be acquired by the purchaser less the value of the reversion, already belonging to the Earl. This latter value has been fixed at 120*l.* On these figures it is, I think, indisputable that the money value of the benefit accruing to Earl Fitzwilliam by the termination of the lease by reason of his then becoming owner in fee in possession of these premises is 500*l.* less 120*l.*, or 380*l.*

But the "benefit accruing to the lessor by reason of the determination of the lease" is the very thing which is to be taxed under the provisions of s. 13, sub-s. 1, of the Finance Act of 1910. The duty of 10 per cent. upon the money value of that benefit is styled the reversion duty, and if the matter stood there, no doubt could, I think, be entertained that this duty would be leviable on the sum of 380*l.*

It is contended, however, that the provisions of the 2nd subsection of this section, prescribing the mode in which the value of the benefit so designed to be taxed is to be ascertained, prohibit such a conclusion. By the sub-section it is enacted that the value of this benefit shall be "deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines," less certain deductions inapplicable in this case, "exceeds the total value of the land at the time of the original grant of the lease, to be ascertained," &c.

The potent governing word, it is argued, is the word "land." That, it is insisted, means the physical thing with the physical erections upon it, and the benefits which the owner may derive from the fact that a certain person was licensed under an old licence to sell drink for consumption on these premises is no

part of this land itself, and, therefore, should be ignored, and the total value of the land be taken to be the sum it would fetch in the market if this licence did not exist. That sum is fixed at 300*l.*

This was, in substance, the only argument put forward in support of the proposition that, notwithstanding the words of the final sub-section of this s. 13, the lessor should escape the payment of duty on more than one-half of the money value of the benefit which obviously accrued to him by the determination of the lease, that is to say, that he should only pay duty on 180*l.* instead of 380*l.* The clause in brackets in the 2nd sub-section links up that sub-section with s. 25 of the statute in which total value is defined. It will be observed that gross value is what the land would fetch if sold in the open market in its then condition free from all incumbrances, charges, or restrictions, other than rates and taxes. The word used in this section is, as in the 13th section, "land." It is clear from the 2nd sub-section of s. 25 that this word includes the buildings erected upon the land. Now the condition of the premises was, amongst other things, this, that they were suitable for the carrying on in them of the business of a publican. That was one of their inherent capacities affecting their value, and, secondly, they were premises in which a person had by the licence of the proper authorities been authorized to utilize this capacity, and to carry on in them this very trade and business, but the fact that a person had been so authorized to utilize this capacity gave to any person who might become owner of the premises a right or claim to have the licence continued.

It is plain from the 3rd sub-section of s. 25 that in ascertaining the total value a deduction is to be made from the gross value of the land in respect of any injurious restrictions imposed upon the owner touching its user. And I am quite unable to see on what principle a right to use the premises in a very profitable way, for which they have a proved capacity, or a chance of obtaining that right, arising from the very fact of the ownership, is not an element increasing the value of the premises just as a restriction on their use is an element diminishing it.

The person who would purchase the premises in the market

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would not purchase the existing licence, but no doubt the right or chance of obtaining a similar licence would belong to him. The lessor is, as I have already pointed out, in as good, if not in a better position, in this respect.

Under s. 25 of the Licensing (Consolidation) Act, 1910, he could obtain a transfer of the licence to himself when he went into occupation, or he could let to a new tenant, who could apply for a transfer. Under s. 26 the owner could object successfully to his former tenant obtaining a removal of the licence from the lessor's premises to some other premises newly acquired by him. The lessor could obtain a protection order authorizing him to continue to carry on this trade in his premises during the currency of the old licence until the time arrived for applying for a transfer. He gets the advantages specified in the Fourth Schedule to this statute. And lastly, he acquires an absolute right, if the business be properly conducted, to have the licence renewed, or compensation paid in case the renewal be refused.

Moreover when that compensation comes to be measured it will, under s. 20, be at a sum equal to the difference between the value of the premises as licensed, calculated as if the licence were subject to the conditions touching renewal existing before the passing of the Act of 1904, and the value which the premises would bear if they were not licensed, together with the amount of loss due to the depreciation of trade fixtures. In the face of these provisions it is, I think, impossible to contend that all these advantages are not part of the benefit that the lessor receives by the termination of the lease, and as they spring from his complete ownership, possession and occupation of his land with the building on it, that they are not elements increasing the value of these premises. I am, therefore, of opinion that the judgment of the Court of Appeal was right, and that the appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, Part I. of the Finance Act of 1909-1910 deals with duties on land values. Amongst these is reversion duty—the duty in question in this case—and it is dealt with by, inter alia, s. 13. Reversion duty is a duty "on the value of the benefit accruing to the lessor by

reason of the determination of" a lease of land. By sub-s. 2 the value of this benefit is to be deemed to be the amount by which the "total value . . . . of the land at the time the lease determines . . . . exceeds the total value of the land at the time of the original grant."

With regard to these two total values a difference is made in the method of their ascertainment. It is recognized that in many cases—of which the present is quite a good example, namely, the determination of a fifty years' lease—it might be well nigh impossible to go back imaginatively and to fix, in view of all the circumstances of that time, what the market value and true total value were half a century ago; and accordingly the total value at the time of the original grant is "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease." In the present case that rent was 4*l.*, and on that basis and a multiple of thirty years' purchase the figure of 120*l.* is agreed upon as correct.

With regard to the total value now—that is to say, at the determination of the lease—the provisions of the Act take us at once into the region of present market value. Many of those provisions were analysed in this House in the case of *Herbert* (1) last year, and it is unnecessary to refer to or repeat the deliverances then made. The present case is simpler, it may be mentioned, in this one respect, namely, that there is here no difference between total value and gross value. Under s. 25, sub-s. 3, various deductions were specified as falling to be made, if the circumstances raise them, from gross value, in order to the ascertainment of total value; but it is agreed in this case that none of these deductions are applicable, and that the total value and gross value are the same.

What, accordingly, at April 6, 1911, is the total and gross value under the statute of these licensed premises, the lease of which expired at that date, the premises then reverting to the lessor? I think that the answer to this is very simple.

By the Interpretation Act, 1889, "land" includes houses and buildings. Its gross value is, under the Finance Act, what it would fetch in the open market, and, in my opinion, it includes

(1) [1913] A. C. 326.

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the land and buildings just as they are found and would fetch, that is to say, with all the advantages, local, natural, and potential, which they possess. It is, indeed, of the commonest experience that it is upon a conspectus of these that an ordinary valuation proceeds.

The true question in this case arises in this way. The premises had an on-licence. They had it at the determination of the lease, and that advantage was continued. In former times some argument might have been presented as to the precarious nature of this on-licence; but precarious or not, it did often affect ordinary valuations. Since the passing of the Licensing Act, 1904, however, such an argument is greatly weakened. For there can be no doubt that under the legislation of recent years the position of premises having an on-licence is that these premises, so to speak, are given a leverage in the matter of the continuation of such a licence, which is of a solid and valuable character.

In the present case this was an on-licence in force on August 15, 1904, and accordingly fell within the Second Schedule of the Licensing (Consolidation) Act, 1910. The on-licence continued to be renewed until the determination of the lease. Accordingly by statute a refusal to renew such licence was not open to the licensing authority except under the limitations of s. 18, namely, on a few specified grounds, such as misconduct of the licensee. If there were no such grounds the power to refuse was not in the licensing justices, but was vested in the compensating authority, and that authority could only refuse to renew subject to compensation under the Act to the persons interested in the licensed premises. Undoubtedly these persons included the landlord. It appears to me accordingly vain to contend that the lessor was not entitled to treat as an element of value that strongly entrenched position which his premises occupied when they were the subject of an on-licence. Nor do I doubt that this position would in the open market have raised the obtainable price.

And the statute strongly reinforces these views even in the case of the lessor himself, for under s. 23 the same provisions, including those with regard to compensation, apply to the case

of transfers "to one person in substitution for another person who holds or has held the licence." And suppose an application for a transfer, say to the lessor himself or to his new tenant, were to be refused, compensation would equally follow under the statute. It is an admitted fact in this case that the on-licence continued till the determination of the lease. It had, so to speak, the living power, with the leverage on price which that implied, of continuation as an on-licence, subject to the strong protective provisions of the Act.

That being the legal situation of these premises, the question for this House to determine is what, with all these advantages above mentioned, is the total or gross value of the land and buildings "at the time the lease determines." My Lords, it is admitted that that value was 500*l.* Why then should it not be taken, and why should the reversion to the landlord, that is to say, the value of the benefit accruing to him by the determination of the lease, not be reckoned at that sum?

It is answered, Because the premises if unlicensed would be worth only 300*l.*, and a licence is something personal. In a sense, a partial and limited sense, this may be true. A licence is in respect of premises, but it is granted to a person. The case might occur in which the likelihood of business being continued there might be enhanced by the qualities, pursuits, or influence of the particular licensee. In the present case the owner was not the licensee, except possibly for the purposes of interim transfer, and it was not maintained that any goodwill of a nature personal to Earl Fitzwilliam attached to the business. This being so, the deduction mentioned in the Finance Act cannot apply. For, my Lords, the Act does deal with goodwill, but it does so in these specific terms: By s. 25, sub-s. 4 (*d*), there is excluded from the value anything attributable "to goodwill or any other matter which is personal to the owner."

Quoad ultra, therefore, the primary condition of valuation remains, namely, the fee simple of the land if sold at the time in the open market by a willing seller in its then condition, with all the advantages, local, natural, and potential, to which I have referred. It is an admitted fact in this case that the

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premises have been let at a gross annual rent of 29*l.*, and it is not suggested that this rent has been swollen on account of any consideration personal to the owner. In the statement of facts admitted "it was agreed that the total value of the property at the determination of the lease, including the licence, was 500*l.*" So that the real question is, Was this on-licence, or was it not, an advantage to these premises which a willing seller would reckon in the amount that he was offered? And that question is answered; and the figure of the answer is 500*l.* The amount by which this exceeds 120*l.*, which was the original value, is 380*l.*, and I do not see how any less sum would fairly represent the reversion or the benefit accruing to the lessor by the determination of the lease.

I do not think it doubtful that the judgment appealed from is correct.

LORD MOULTON.(1) My Lords, this case raises a very short but very important point of law. The appellant as reversioner has come into possession of certain premises on the termination of a lease for fifty years from April 6, 1861, and it becomes necessary for the purposes of reversion duty to ascertain the "total value" of the property at the expiration of the lease. The house is licensed as a public-house, and as such it is admitted that the value of the property at that date was 500*l.* It is also admitted that if it were unlicensed its value would be 300*l.* The question is whether the "total value" is 300*l.* or 500*l.*

"Total value" is a creation of statute. It is defined in s. 25, sub-s. 3, of the Finance (1909-10) Act, 1910, in terms which make it in the present case identical with "gross value" as defined in s. 25, sub-s. 1, of that Act. That definition is as follows:

"For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge,

(1) Per incuriam this judgment was not read, but on the following day the Lord Chancellor moved that it should be handed in and form part of the record.

or restriction (other than rates and taxes) might be expected to realise."

The language of this definition appears to me to mean the market value of the unencumbered fee simple, and this interpretation is confirmed when one examines the rest of the section. I am of opinion that the Legislature intentionally took this practical definition of "gross value" as the starting point for the calculation of the legislative creations of "full site value," "total value," and "assessable site value," and that we are not justified in departing in any way from the simple and direct interpretation of the language used. But if we ask ourselves what is the actual market value of the fee simple in this case it is impossible to exclude the effect of the existence of a licence in respect of it. By purchasing the fee simple, the purchaser would become possessed of substantial advantages by reason of the existence of that licence, and if it had been intended to exclude the effect of those advantages upon the price which a willing buyer would give for the fee simple of the property, specific words would have been used to indicate that such was the intention of the Legislature.

I should be content to rest my judgment on the above reasoning. But there is one matter which was dwelt upon by counsel for the respondents which is, in my opinion, entitled to some weight and which confirms the conclusion to which I should otherwise have come. Sub-s. 4 provides that the "assessable site value" of land is to be derived from the "total value" by deducting (among other things)—

"(*d*) Any part of the total value which is proved to the Commissioners to be directly attributable to . . . . goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land."

It is not necessary to decide whether or not the word "goodwill" includes the whole or any portion of the increment of value due to the existence of a licence. I incline to the opinion that it does not, but I do not desire to decide the point. But to my mind the presence of this provision shews that the Legislature contemplated that "total value" (and, therefore, of course, "gross value") might contain elements due to "goodwill" or

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"matter which is personal to the owner." Nothing could more forcibly indicate the intention of the Legislature to take actual selling value as its point of departure, because the connection of an increment due to goodwill with the value of the fee simple is much less close from the point of view of being recognizable at law than is the added value due to the existence of a licence with all the statutable advantages that it gives to the owner of the fee.

I am therefore of opinion that in ascertaining the "gross value" of land it is right to take the amount which the fee simple of the premises considered as licensed premises would sell for in the open market, and that therefore the decision appealed against was right, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 6, 1914.

Solicitor for appellant: *C. E. Pullon.*

Solicitor for respondents: *Hugh Bertram Cox (Solicitor of Inland Revenue).*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

MILNE AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)* 1914 April 7.

Revenue—Settlement Estate Duty—Property passing on Death—Settlement—Death of Settlor within Three Years—Finance Act, 1894 (57 & 58 *Vict.* c. 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 5, *sub-s.* 1.

By s. 1 of the Finance Act, 1894, estate duty is leviable upon the principal value of all property, settled or not settled, which passes on the death of the deceased.

By s. 2, sub-s. 1, as amended by s. 59 of the Finance (1909-10) Act, 1910, "Property passing on the death of the deceased shall be deemed to include" (inter alia) property taken under a disposition purporting to act as an immediate gift inter vivos, provided the disposition be made within three years of the death of the disponer.

By s. 5, sub-s. 1, "Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property" a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied:—

Held by Viscount Haldane L.C., Lord Atkinson, and Lord Parker of Waddington, Lord Dunedin dissenting, that the notional passing of property on death introduced by s. 2 did not apply to s. 5, and that the words of the latter section were to be construed in their ordinary and natural sense.

Where therefore the owner of certain property, in consideration of natural love and affection, settled it by deed on his son for life with remainders over and died within three years of the execution of the deed, and the property was liable to estate duty on the death of the settlor:—

Held, that the property did not pass under that disposition on the death of the deceased within the meaning of s. 5, sub-s. 1, and that settlement estate duty was not payable in respect thereof.

Decision of the Court of Appeal [1913] 2 K. B. 606 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Horridge J. (2)

By an indenture of settlement dated May 20, 1909, and made

* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD DUNEDIN, and LORD PARKER OF WADDINGTON.

(1) [1913] 2 K. B. 606. (2) [1913] 1 K. B. 337.

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between Henry Ernest Milne, since deceased, of the first part, John Rothwell Milne, of the second part, and the respondents Constance Alice Maud Milne (late the wife and now the widow of the said Henry Ernest Milne) and Nathaniel Percy Milne (thereinafter called "the trustees"), of the third part, in consideration of the natural love and affection of the said Henry Ernest Milne for his son the said John Rothwell Milne, certain shares and sums of stock mentioned in the schedule thereto which the said Henry Ernest Milne had transferred into the names of the trustees were settled by him upon trusts which were shortly as follows: Upon trust for the said John Rothwell Milne for his life subject to determination as therein mentioned and after his death upon trust for his issue as he should by deed or will appoint and in default of and subject to any appointment in trust for his children who being male should attain twenty-one years or being female should attain that age or marry in equal shares.

The testator died on December 8, 1911, within three years of the date of the settlement.

The value of the settled property was assessed for the purposes of estate duty at 3980*l.* 6*s.*, and estate duty thereon was duly paid by the respondents as on the death of the settlor.

The Commissioners of Inland Revenue further claimed that settlement estate duty at the rate of 2*l.* per cent. became payable under s. 5 of the Finance Act, 1894, on the death of the settlor in respect of this settled property, but this claim was disputed by the respondents.

Accordingly the Attorney-General filed an information against the respondents to enforce the claim.

Horridge J. held that settlement duty was payable, but his decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.).

1914. March 6. *Sir John Simon, A.-G.*, and *Sir Stanley Buckmaster, S.-G.* (with them *W. R. Sheldon*), for the appellant. The question is whether s. 2, sub-s. 1, of the Finance Act, 1894 (as amended by s. 59 of the Finance (1909-10) Act, 1910), which puts a particular construction on the words "property passing on the

death of the deceased," applies to s. 5, sub-s. 1. The Legislature contemplates that there may be either an actual or a notional death, and when it speaks in Part I. of the Act of certain things happening to property passing on the death s. 2, sub-s. 1, says that "death" is to be treated as a notional death or "passing" as a notional passing, it matters not which, the intention being that the dates shall coalesce. Sect. 2, sub-s. 1, is not wanted simply to expand s. 1, but applies to other sections in Part I. and particularly to s. 4, sub-s. 2. It is startling to say that the perfectly general statement in s. 2 as to the meaning of particular words is not to apply to s. 5. A taxing statute, like any other statute, must be so construed as to give to the words their plain meaning.

Settlement estate duty is an appendage to estate duty, to which the property in question in this case is admittedly liable, and there is no reason why the construction of the words "passing on the death" furnished by s. 2 should not apply to s. 5. Sub-s. 2 of s. 5 has a bearing on the question. That section provides for the franking of the settled property from duty during the life of the settlement, and the price of that privilege is the payment of settlement estate duty in the first instance. Sect. 5 was never meant to say that the Revenue is not to get the price of that franking where a man settles property on other people shortly before his death. In every quarter of the United Kingdom this question has been either decided or assumed in favour of the Crown: *Attorney-General* v. *Chamberlain* (1); *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (2); *Attorney-General* v. *Smyth*. (3)

Danckwerts, K.C., and *J. E. Harman*, for the respondents. Sect. 2 is merely subsidiary and supplemental to s. 1. Its object was not to furnish a definition but to bring into taxation something which was not included in s. 1: *Earl Cowley* v. *Inland Revenue Commissioners*. (4) If the Legislature had intended to say that throughout Part I. of the Act "property passing on the death" was to be deemed to include property passing within three years of the death the proper place for that provision was the

(1) (1904) 90 L. T. 581.
(2) (1906) 8 F. 724.
(3) [1905] 2 I. R. 553.
(4) [1899] A. C. 198, at p. 211.

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definition section, s. 22, which defines property passing on the death in a manner which excludes notional passing. No argument can be founded on s. 4. The object of that section was not to impose a duty but to determine the rate of duty already imposed by the Act, and one would naturally suppose that it would include everything on which estate duty is payable.

The respondents rely upon the well-known rule of construction applicable to taxing statutes, namely, that in order that a subject may be taxed he must be brought within the letter of the statute: *Partington* v. *Attorney-General* (1); *Attorney-General* v. *Earl of Selborne.* (2) The construction of the Crown involves striking out from s. 5, sub-s. 1, the words "under that disposition" and giving an artificial meaning to the words "passing on the death." This sub-section was not intended to impose settlement estate duty wherever estate duty was payable and there happened to be a settlement, but was contemplating a change of possession and a limited interest arising on the death. There is nothing in any other provision of the Act which qualifies the plain words of this sub-section.

Sir Stanley Buckmaster, *S.-G.*, in reply. Sect. 22 does not define "property passing on the death" but merely states that it includes a certain class of property which but for that statement might be thought not to be included. The prefacing statement in s. 5, sub-s. 1, implies that it covers the same ground as ss. 1 and 2.

The House took time for consideration.

April 7. VISCOUNT HALDANE L.C. My Lords, at the conclusion of the case made for the Crown, the inclination of my opinion was that the Attorney-General had succeeded in shaking the foundation on which the judgment of the Court of Appeal rested. After further consideration I have arrived at a different conclusion, for which I will state my reasons.

The question is whether settlement estate duty became payable under s. 5 of the Finance Act, 1894, on the death of

(1) (1869) L. R. 4 H. L. 100, at p. 122.
(2) [1902] 1 K. B. 388, at p. 396.

Henry Ernest Milne, which took place on December 8, 1911, within three years of a voluntary settlement of property made by him on May 20, 1909. By s. 2 of the Act of 1894, property taken under a disposition purporting to act as an immediate gift inter vivos is, unless the disposition was made twelve months before the death of the disponer, deemed to be property passing on his death, and is accordingly liable to estate duty at all events. The period of twelve months was, by s. 59 of the Finance Act of 1910, extended to three years in the case of dispositions made after April 30, 1908. That estate duty became payable on the death of the deceased is not disputed; but as the first taker under the disposition succeeded for life only, and was alive when he died, whereby no further estate duty could become payable until the death of a person taking under the settlement and competent to dispose, the question is raised whether settlement estate duty is not payable.

The answer to this question depends mainly on the interpretation to be placed on four sections of the Finance Act, 1894. By s. 1 estate duty is to be levied upon the principal value of property, settled or unsettled, which passes on death. By s. 2 "property passing on the death of the deceased shall be deemed to include" certain specified cases of property which does not actually pass on death, like the property to which s. 1 relates. The meaning of s. 2 was discussed in this House in *Earl Cowley* v. *Commissioners of Inland Revenue* (1), and was explained to be that the section was not a definition of the field of s. 1, but was framed for the purpose of rendering liable to taxation certain kinds of property that do not actually pass on death, but are sufficiently analogous to property so passing as to make it proper to tax them. Sect. 2 is thus not a definition section, but an independent section operating outside the field of s. 1.

My Lords, I think that this view of s. 2 as not being a definition section is the correct one. It is confirmed by the presence in s. 22 of what is a real definition of property passing on death, as including property passing at a period ascertainable only by reference to death. I now come to s. 5. It is in these terms: "Where property in respect of which estate duty is leviable is

(1) [1899] A. C. 198.

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settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(*a*) A further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate herein-after specified, except where the only life interest in the property after the death of the deceased is that of a wife or a husband of the deceased."

The section, therefore, applies only to a case in which certain conditions are fulfilled. The property must be property on which estate duty is leviable. It must then be either settled by the will of the deceased, and so be property falling within s. 1, or it must be settled by some other disposition, and pass under that disposition on the death of the deceased to a person not competent to dispose. If the disponer is some one other than the deceased, a case of the kind in question is outside s. 2 altogether. What happens is the event of passing in point of fact on death according to the natural meaning of the words. The only case to which a notional passing under that section can possibly extend is one where the disposition which creates the settlement is that of the deceased himself.

My Lords, for reasons already indicated, I have, after consideration, come to the conclusion that s. 2 cannot properly be read as extending the category of a notional passing on death beyond what is requisite for the special purpose of bringing certain cases within s. 1 in order to impose the particular tax which s. 1 levies. Sect. 2 does not purport to contain a general definition made applicable to every reference to passing on death in the subsequent sections of the Act. Such a definition occurs only in s. 22, a real definition section, which is general in its application, but which does not affect the question before us. If this be so, then s. 5 ought to be read literally, as referring only to an actual passing under his disposition on the death of the settlor, and as excluding the notional passing, which s. 2 recognizes for a special purpose. The duty imposed by s. 5 is a new and quite different duty.

It may be that what Parliament thought it was doing in inserting after "passing" the words "under that disposition"

was, as the Attorney-General suggested, merely to provide against the event of the passing to a person not competent to dispose taking place under some disposition made independently of the deceased. It may be that, if probabilities, apart from the words used, are to be looked at, there is, on the construction which the Court of Appeal have put on the statute, a casus omissus which the Legislature was unlikely to have contemplated. But, my Lords, all we are permitted to look at is the language used. If it has a natural meaning we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a statute which imposes taxation. It is not only possible but natural to give to the words of s. 5 the meaning contended for by the respondents, a meaning which restricts them to what has taken place in fact.

The only legitimate consideration that could justify a different interpretation would be one which resulted from s. 2 being read as defining what was meant by "passing on death" throughout the Act. A close examination of the structure of the Act has satisfied me that this section lays down no such general canon of construction, but is confined in its operation to the limited function of adding to the cases in which the duty enacted by s. 1 is imposed. In other words, s. 2 has no reference to the settlement estate duty which s. 5 imposes as a new and separate duty. Having come to this conclusion, I see no answer to the reasoning of Buckley L.J. in the Court of Appeal.

I am, therefore, of opinion that the appeal fails and ought to be dismissed with costs. I move accordingly.

LORD ATKINSON. My Lords, the facts have been already stated. I think the decision of the Court of Appeal was right, and that this appeal should be dismissed.

The question turns upon the construction of the 5th section of the Finance Act of 1894. To succeed the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to shew that if the section be not construed as the Crown contends it should be

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construed property which ought to be taxed will escape taxation, or will enjoy, under s. 5, sub-s. 2, an immunity from successive levies of estate duty. These evils, if such they be, must, if they exist, be cured by legislation. Judicial tribunals must in interpreting these taxing Acts stick to the letter of the statute: *Partington* v. *Attorney-General* (1); *Attorney-General* v. *Lord Selborne.* (2)

The passing of property within the meaning of the 1st section of the Act has been conveniently styled "actual passing," and that under the 2nd section "notional" passing, that is, passing which in fact takes place before it is to be taken to have taken place. Under this latter section, the property the subject of this settlement of May 20, 1909, which in fact passed from the settlor to the trustees and the beneficiaries at that date, was deemed to pass on December 8, 1911, and by virtue of that assumption became liable to estate duty.

Now, the conditions which must be fulfilled in order to render, under the 5th section, property subject to the additional duty styled settlement estate duty are these: First, estate duty must be leviable upon it. That condition has been fulfilled. Second, the property must be settled by one of two kinds of dispositions.

"Settled property" is, by the definition clause, s. 22, defined to be property comprised in a "settlement," and a "settlement is defined to be "any instrument, whether relating to real or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

Under the latter section a settlement must limit land or any estate or interest in land to, or in trust for, persons by way of succession, and whether it does so or not is to be determined (sub-s. 4) by the state of facts, and the limitations of the settlement at the time of the latter's taking effect. In the case of a settlement by will, this time, of course, must be at the death of the testator, since the will only speaks from that date. The "notional" passing of property cannot in any way relate to the first mode of settlement mentioned in s. 5 of the Finance Act,

(1) L. R. 4 H. L. 100, at p. 122. (2) [1902] 1 K. B. 388.

1894. The second mode of settlement must, like the first, create a succession, and whether it does so or not must in this case, as in the first, be determined at the time that settlement takes effect by the condition of the limitations of the settlement itself. This in the present case must be the date of the instrument. The limitations of the settlement then become operative, and to be within this section they must provide that under them and by virtue of them the property should on a certain event pass to some person not competent to dispose of it. That event is the death of some person not necessarily the settlor.

The words "under that disposition," in my view, can only mean that the settlement itself is to indicate the event upon which the property is to pass, the person to whom it is to pass, and the estate or interest which is to pass. Prima facie, the word "death" naturally means a real death, not a "notional death." There is no such thing provided for in the Act as a "notional death." There is no clause to the effect that a person shall be deemed to be dead when in fact he is alive. There is no doubt a provision that there shall be a "notional" passing of property, not, however, to any person named or indicated, or for any particular estate or interest. Sect. 2 enacts that property which, in fact, has passed while a person is alive shall, in certain cases, be deemed to have passed as if he were then dead. This section, however, is not a definition section. It is supplementary to s. 1, and is designed to make liable to estate duty certain dispositions of property which are outside the scope and beyond the reach of s. 1. Even if the words of s. 5 were altered so as to run "by some other disposition, passes, *or is deemed to pass*, under that disposition on the death of the deceased to some person not competent to dispose of the property," as, in effect, the Crown, I think, contend they should, it does not appear to me that it would be sufficient for the purpose of the Crown, because the property would then pass, not under the "disposition," but under s. 2 of the Act, while it would not be carried by that section to the person to whom it must, under s. 5, be carried, namely, one not competent to dispose of it.

I do not think the provisions of the settlement can be put aside in part and retained in part in this way, put aside where they

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fix the event on which the property is to pass, actual death, and retained when they designate the individual to whom it is to pass. Neither do I think words can be interpolated into the section to fix a burden on the subject not imposed by the letter of the statute. If there be a casus omissus in the Act it must be provided for by legislation. The appeal should, I think, be dismissed with costs.

LORD DUNEDIN. (1) My Lords, put in a single sentence, the question in this case may be stated thus: Does the word "passes" in s. 5, sub-s. 1, of the Finance Act of 1894 mean "passes in the sense of this Act," or does it not? Unfortunately, to answer that question, as to which there has been a difference of judicial opinion, it is necessary to speak more at length.

I am not aware that, as a mere question of terminology, "to pass" has any technical meaning. I do not know if it has been used in other Acts of Parliament before the Finance Act. I have myself only succeeded in finding it in the Succession Duty Act of 1853. It is not there used in the taxing sections —which speak of dispositions and devolutions of law conferring a "succession"—but it is used in s. 14, which enacts that "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have *passed* by reason of death to any other successor," then only one duty shall be payable. It is obvious that the word is here treated as a word of ordinary language; and the meaning in the context is plain enough.

The Finance Act itself does not define it. Sect. 22, the definition section, (*l*), provides that the expression "property passing on the death" shall include certain things, but there, again, the word "passing" is not itself defined. We are, therefore, left to the meaning of ordinary language, subject to such light as the general use of the word in the Act and the context may give. I shall revert to this, but first I wish to treat it in reference to the general scheme of the Act.

The paramount enacting section of the Act is undoubtedly to be found in s. 1. I need not quote it. The duty which it

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is the object of the Act to levy is imposed on property real and personal, settled or not settled, which "passes" on the death of any person dying after the commencement of the Act. Now, although the word "passes" is what I may call a neutral or vague word, it is so naturally associated with the idea of "from" and "to," and "on the death," so directs attention to the death of a person who leaves property behind him, that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have s. 2. That section was authoritatively discussed in your Lordships' House in the case of *Earl Cowley*. (1) Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate—and that is all that is material—s. 2 sweeps into the net various things which s. 1 would have failed to secure, or, as Lord Watson put it in the case of *Attorney-General* v. *Beech* (2), "it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased."

How does s. 2 do this? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased—which is already taxed by virtue of s. 1—shall be deemed to include the property following, that is to say—and then follow the various sub-sections.

It seems to me that that is as much as to say that the words, "property passing on the death," in the 1st section, are to be read as if the words, "including the property following, that is to say"—(and then all the sub-sections)—had been there inserted. In other words, I do not think that any one can criticize Lord Macnaghten because in *Cowley's Case* (1) he talks of property being "deemed to pass," although that expression is not actually used. The net result is that the expression, "property which passes," in the 1st section, must include property which is deemed to pass by virtue of the 2nd section—for s. 1 is the only taxing section.

(1) [1899] A. C. 198. (2) [1899] A. C. 53, at p. 59.

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I now pass to s. 5, but before I examine it minutely let me look at the situation as it would have been if there had been no s. 5 at all.

By ss. 1 and 2 a tax is imposed whenever, to use very untechnical language, a death occurs, and somebody in consequence gets property which he did not have before; and this tax is imposed on the property according to *its* value, irrespective of the question of the kind of interest which the new taker gets, and of his or her relation to the deceased person. It is very clear that had the matter rested there the successive takers, under settlement, of interests less than a full fee would be very hardly dealt with. The whole object, therefore, of s. 5 is to temper this hardship, and the paramount provision of it is sub-s. 2, which enacts that once estate duty has been paid since the date of the settlement in respect of settled property, then no more shall be paid till the death of a person competent to dispose. But if sub-s. 2 had stood alone the property under settlement would in a series of years have come off advantageously in comparison with unsettled property. It was therefore thought right to arrange for a further estate duty, to be called settlement estate duty, to be levied upon settled property, and that is done by s. 5, sub-s. 1 (*a*).

So far, then, it would seem that there are two questions to be answered: (1.) Is property liable to estate duty? That is answered by asking whether it does or does not pass on a death, either as under s. 1 or as under s. 2. Then (2.) if it is so liable, is it also liable to settlement estate duty? Now, prima facie one would expect that the scope of the two sets of provisions would be the same, i.e., in other words that the question must be answered as to those kinds of property which are swept in by s. 2, just as much as to those which fall under s. 1. Inasmuch, however, as this is a taxing statute, and the duty here is an additional duty, I consider that it must be shewn that the words would clearly cover the individual case to which it is right to apply them.

I now take the words of s. 5, sub-s. 1 (*a*). Now, I think there we have three conditions expressed: 1. The property must be property in respect of which estate duty is leviable. That

obviously includes property brought in by s. 1, and also that brought in by s. 2.

2. It must be settled either (*a*) by the will of the deceased, or (*b*) by some other disposition.

3. If it falls within the case (2) (*b*), i.e., is settled by some disposition other than the will of the deceased, it must pass under that disposition on the death of the deceased to a person not competent to dispose.

It is common ground that as regards the property here in question, conditions 1 and 2 (*b*) are fulfilled. It is property in respect of which estate duty is leviable. It is settled by a disposition other than the will of the deceased. The whole controversy arises as to whether it fits the words of condition No. 3. Now let me suppose for a moment that the words "on the death of the deceased" had been omitted. I imagine there could have been little controversy. Why, then, are these words inserted? The opponents of the Crown say in order to make sure that the passing is a natural passing which synchronizes with the death, and here there was no such passing, for the property passed when the disposition was made two years before the death.

My Lords, I think the words were introduced for quite another purpose. We must notice that here we are making an inquiry which is unnecessary as regards the duty imposed by s. 1. That duty, the regular estate duty, is imposed quite irrespective of who is the taker of the passing property, or of what his interest therein is. But here we wish to know whether, the property being settled, the taker is a person who is not competent to dispose. Now, that necessitates a time element as applied to the different and successive interests possible to be taken by some one under the settlement. That time element is given by these words. If they were not there consider what might be the result. A settlement might be made two years ago. A succession of limited interests is created with an eventual remainder in full fee. By the time the death occurred all the possible takers of the limited interests might have died, and the actual taker would be a person competent to dispose. It would be very unfair that he should have to pay a settlement duty for a settlement which

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had, so to speak, evaporated as a settlement before the time for paying the tax arrived.

I therefore come to the conclusion that the word "passes" in this section is used in the same sense as it is used in every other section, as equivalent to passes within the meaning of the Act—inclusive, that is to say, of such passing as is described in s. 2. When I say every other section I allude particularly to s. 4, s. 7, sub-ss. 4, 10, s. 8, sub-s. 4.

As I understand the argument against me, it is that what I may call the non-natural meaning of passing explained by s. 2 is limited to the purposes of the duty imposed by s. 1, and that s. 5 imposes a new duty, and, therefore, being a taxing statute, as the non-natural meaning is not repeated in so many words as regards the new duty, the natural meaning must be reverted to.

I quite bow to the rule as to taxing statutes. But after all, the question is what the words mean, and the expressions used must be given fair play. If, as here, where the word "passes" is used in any section except the 5th you are bound to give it the extended meaning in order to make sense, I think it is not giving the words used fair play suddenly to revert to another meaning in s. 5, a section which is inextricably intertwined with the other sections, and which, if construed as that argument would construe it, leaves a perfectly obvious casus improvisus; for why should a will bring liability for the duty—other dispositions bring none?

I am therefore of opinion that the appeal should be allowed and the judgment of Horridge J. restored.

Lord Parker of Waddington. (1) My Lords, Henry Ernest Milne died on December 8, 1911, having by indenture dated May 20, 1909 (less than three years before his death), settled certain property upon trust for his son, John Rothwell Milne, for life, and subject thereto, on trust for the benefit of the children or issue of John Rothwell Milne.

The question arising for decision on this appeal is whether, on the death of Henry Ernest Milne, who predeceased John Rothwell Milne, settlement estate duty became by virtue of the 5th section

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of the Finance Act, 1894, as amended by s. 59 of the Finance (1909-10) Act, 1910, payable in respect of the property comprised in this settlement.

The 1st section of the Finance Act, 1894, imposes in the case of every person dying after August 1, 1894, a duty, called "estate duty," leviable on the capital value of all property which passes on the death of such person. The expression "property passing on the death" includes, according to the definition contained in the 22nd section of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to death." The expression "passing on the death" is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes.

The 2nd section of the Act, by providing that property passing at the death shall be deemed to include certain kinds of property which do not in fact pass at the death, artificially enlarges the ambit of the expression "property passing at the death." It also artificially limits such ambit by expressly excluding certain kinds of property which do in fact pass at the death. It is in no sense a definition section.

It cannot be disputed that by virtue of s. 2, coupled with s. 59 of the Finance (1909-10) Act, 1910, the property passing on the death of Henry Ernest Milne is to be deemed to include the settled property, and estate duty on such settled property is therefore clearly payable.

The 5th section of the Finance Act, 1894, imposes an additional estate duty (called settlement estate duty), not on all property in respect of which estate duty is leviable, but where property on which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the property. It was

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argued that the initial words of this section, "where property in respect of which estate duty is leviable," raise some inference or presumption as to the kinds of property in respect of which settlement estate duty is intended to be charged.

I do not think that this is so. The words in question merely make it clear that in no case when estate duty is not leviable is it intended to impose settlement estate duty. The kinds of property on which, where estate duty is leviable, it is intended to impose the additional duty, must be gathered from the following words, and consist of (1.) property settled by the will of the deceased; and (2.) property which, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the same. Clearly the property comprised in the settlement does not pass under the will of the deceased; nor, though it was settled by some other disposition, does it pass under that disposition on the death of the deceased. How, then, is it proposed to shew that it is subject to settlement estate duty? The argument to that effect may be stated as follows: First, it is said that, by virtue of the 2nd section, the settled property must be deemed to pass on the death of Henry Ernest Milne; secondly, it is said that, this being so, it must be deemed to pass under the settlement to the person in possession of it at that death; and, thirdly, it is said that this person is a person not competent to dispose of the property.

In my opinion this argument reads into that 2nd section a great deal more than it contains. The 2nd section, even if it be construed as providing that the settled property is to be deemed to pass on the death of Henry Ernest Milne, certainly does not provide to whom or under what disposition it shall be so deemed to pass. Indeed, these points seem to me to be immaterial for the purpose of the 2nd section, which merely enlarges on the one hand and narrows on the other the ambit of the expression, passing on the death. For the purpose of the imposition of estate duty, it does not matter to whom or under what disposition the property passes. It is otherwise for the purpose of the settlement estate duty, and had the object of s. 2 been to create a notional passing for the purpose of settlement

estate duty as well as for the purpose of estate duty, one would have expected s. 2 to contain some provisions as to whom and by what disposition the property was to be deemed to pass. Further, the 5th section is so worded as, in my opinion, to point to an actual as distinguished from a notional passing on death. I do not think, therefore, that the argument I have referred to ought to prevail. The Finance Act is a taxing statute, and if the Crown claims a duty thereunder it must shew that such duty is imposed by clear and unambiguous words. All the words of s. 5 can be satisfied without having recourse to any notional passing of property, and in my opinion considerable violence would be done to these words if the idea of a notional passing of property were introduced into the section.

In my opinion the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 7, 1914.

Solicitor for appellant: *H. Bertram Cox* (*Solicitor of Inland Revenue*).

Solicitors for respondents: *Rooke & Sons.*

[HOUSE OF LORDS.]

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LIGHTFOOT (BY HIS NEXT FRIEND) . . . . APPELLANT;

AND

MAYBERY AND ANOTHER . . . . . RESPONDENTS.

Will—Construction—Realty—Devise—"Nearest male heir"—"Nearest and eldest male relative"—Vesting—Postponement—Intestacy.

The testator, a bachelor, devised real estate in trust for M. for life and after his decease upon trust to convey the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me" he directed his trustee to convey the same "unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate in trust for M. for life, expressing a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value and keeping up the remainder in trust for "my nearest and eldest male relative" who should be such at the death of M.

The respondent Mrs. W. was the heiress-at-law of the testator both at his death and the death of M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin and at the time of M.'s death was the appellant, a son of a daughter of the same cousin:—

Held, (1.) that the expression "nearest male heir" was not used in a technical sense as meaning the testator's heir being a male, but meant the testator's nearest male relative; (2.) that the person to take under the devise in remainder was to be ascertained at the death of M., the tenant for life, and that on the death of the latter the real estate vested in the appellant.

Decision of the Court of Appeal [1913] 1 Ch. 376 reversed.

APPEAL from an order of the Court of Appeal (1) affirming (with a modification) a judgment of Joyce J. (2)

Thomas Chichele Bargrave Watkins by his will dated January 16, 1880, after bequeathing a pecuniary legacy to Henry Oxenford Aveline Maybery and after devising to his, the testator's, two maternal aunts Mrs. Harvey and Mrs. Rainer,

* *Present:* EARL LOREBURN (during the argument only), LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1913] 1 Ch. 376. (2) [1912] 2 Ch. 430.

both of whom predeceased him, certain property in the county of Kent, proceeded as follows:—

"I devise the rest and residue of my real property wheresoever or whatsoever to the said Henry Oxenford Aveline Maybery and his heirs in trust to pay the rents and profits thereof yearly to his brother Herbert Hartland Maybery for the term of his natural life and from and after his decease to convey assign and assure the same unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said Henry Oxenford Aveline Maybery to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my said eldest male relative I bequeath the rest and residue of my personal property to the said Henry Oxenford Aveline Maybery in trust to permit his said brother Herbert Hartland Maybery to use the same with the exception of all monies or securities for money which are to be held by the said Henry Oxenford Aveline Maybery and the interest profits and proceeds thereof only to be paid yearly or as he the said Henry Oxenford Aveline Maybery may desire to his said brother the said Herbert Hartland Maybery And I desire the said Herbert Hartland Maybery neither to mortgage nor anticipate in any manner the said annual income whatsoever the amount may be paid into his hands by his said brother Henry Oxenford Aveline Maybery and I confidently expect him to aid and assist his said brother in keeping my real property which I have devised to him for the term of his natural life in fair and tenantable repair such repair as his brother the said Henry Oxenford Aveline Maybery may think necessary for preserving the value of the property and keeping up the remainder in trust for my nearest and eldest male relative who shall be such at the time of the decease of the said Herbert Hartland Maybery And I hereby appoint and nominate the said Henry Oxenford Aveline Maybery sole executor of this my will."

The testator died a bachelor on February 23, 1897.

The testator was at his death entitled to real estate of considerable value in the counties of Brecon, Radnor, and Kent.

Henry Oxenford Aveline Maybery (the trustee of the will)

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died on July 30, 1906, and his widow, the respondent Lucy Powys Maybery, was his legal personal representative.

Herbert Hartland Maybery (the tenant for life under the will) died on October 12, 1910.

The testator was the only child of Thomas and Charlotte Watkins, both of whom died in the testator's lifetime.

The testator's father, Thomas Watkins, had four brothers and one sister, all of whom died in the testator's lifetime. Two of the brothers and the sister died without issue. Of the remaining brothers, Evan Bevan Watkins had one child only, namely, the respondent Mary Jane Gwenllian Watkins, who was the wife of John James Watkins but had no issue; Lewis Watkins had issue six daughters, of whom three died in his lifetime without having been married, and three survived him and were now living, namely, Elizabeth Sarah, the wife of Morgan Powell Williams, Maria Sybil, the wife of Charles Le Grouchy, and Mary Watkins, a spinster.

Of the surviving daughters one only, Mrs. Powell Williams, had issue. She had one son, Lewis Watkins Powell Williams, and three daughters, Jane Margaret Powell Williams and two others.

Lewis Watkins Powell Williams survived the testator and died a bachelor in the lifetime of Herbert Hartland Maybery.

Jane Margaret Powell Williams married Henry Le Blanc Lightfoot on April 11, 1899, and there was issue of the marriage one son, the appellant, who was born on April 3, 1909, and two daughters.

At the date of the testator's death, and also at the date of the death of Herbert Hartland Maybery, the respondent Mary Jane Gwenllian Watkins was the testator's heiress-at-law.

At the date of the testator's death Lewis Watkins Powell Williams was his nearest male relative.

At the date of the death of Herbert Hartland Maybery the appellant was the nearest male relative of the testator.

In 1897 an originating summons was taken out by the executor and trustee of the testator's will against Herbert Hartland Maybery and others for the determination of certain questions of construction arising thereunder.

The summons was heard before Stirling J., who held (inter alia) that there was no trust binding on the defendant Herbert Hartland Maybery to repair the testator's real estate.

On the death of Herbert Hartland Maybery the question arose whether upon the true construction of the testator's will and in the events which had happened the real estate devised by the will devolved on the death of the tenant for life upon the appellant or was undisposed of, and an originating summons was taken out by the respondent Lucy Powys Maybery to determine this question.

Joyce J. held that the person to take under the will on the death of the tenant for life must be the testator's heir being a male, and that, as no person answered that description, the gift failed, and he declared that the real estate devised by the will was undisposed of and devolved upon the respondent Mary Jane Gwenllian Watkins as heiress-at-law of the testator.

The Court of Appeal (Cozens-Hardy M.R. and Hamilton L.J., Buckley L.J. dissenting) affirmed this decision except that they struck out the concluding words of the declaration.

The Master of the Rolls and Hamilton L.J. were of opinion that the person to take was to be ascertained at the testator's death in accordance with the established rule of construction in favour of early vesting, and that the concluding clause of the will being inoperative was not sufficient to postpone the vesting till the death of the tenant for life, but they did not express any opinion on the expression "my nearest male heir."

Buckley L.J. held (1.) that the context was sufficient to shew that the expression "my nearest male heir" meant the testator's nearest male relative, and (2.) that the final clause in the will was material as affording a clear indication that such person was to be ascertained at the death of the tenant for life.

The respondent Lucy Powys Maybery did not appear.

1914. Jan. 27, 29. *T. R. Hughes, K.C.*, and *L. F. Potts*, for the appellant. 1. Upon the construction of this will "nearest male heir" means nearest of the testator's male kindred, and where there are two in the same degree of consanguinity the elder of

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them in point of years is to take. In this will "heir," "kindred," and "relative" all mean the same thing. "Nearest male heir" is not used as a technical expression. Joyce J. held that the "nearest male heir" meant the testator's next heir being a male, and that as there was no person in existence answering that description the gift in remainder failed. But Lord Coke's rule, if not altogether abolished, has been much discredited and is confined to cases where the words stand unexplained: Hawkins on Wills, 1st ed., pp. 169—171; *Chambers* v. *Taylor*. (1) If this case is to be decided on technicalities it is sufficient to say that the term of art is not "male heir" or "female heir" but "heir male" or "heir female." Lord Halsbury, in *Leader* v. *Duffey* (2), in discussing rules of construction says that the primary object of the Court should be to ascertain the meaning of the instrument taken as a whole in order to give effect to the framer's intention.

2. The person to take is to be ascertained at the death of the tenant for life. The concluding clause of the will is conclusive as to this. As part of the testator's glossary that clause, though held to be unenforceable against the tenant for life, is as much to be regarded as any other part of the will. Where the direction to convey constitutes the only gift, that circumstance, though not conclusive by itself, is of considerable weight in fixing the time of vesting, and coupled with the other indications in this will shews that the testator meant the gift in remainder to vest not on his death but on the death of the tenant for life: *Selby* v. *Whittaker*. (3) The appellant as the nearest male relative of the testator at that date is therefore entitled.

Younger, *K.C.*, and *J. E. Harman*, for the respondent Mary Jane Gwenllian Watkins. 1. "Nearest male heir" is a technical term and means the heir general being a male. Lord Coke's rule, so far as applied to heirs general as distinguished from estates tail, is still in force: Hawkins on Wills, 1st ed., pp. 173, 174; Leake on Property in Land, 2nd ed., p. 133; *Wrightson* v. *Macaulay* (4); Jarman on Wills, 6th ed., vol. ii., p. 1558; *Doe* v.

(1) (1837) 2 My. & Cr. 376, at p. 385.
(2) (1888) 13 App. Cas. 294, at p. 301.
(3) (1877) 6 Ch. D. 239, at p. 246.
(4) (1845) 14 M. & W. 214.

Angell (1); *Winter* v. *Perratt* (2); *Pugh* v. *Goodtitle* (3); *Pearce* v. *Vincent.* (4) These authorities decide that effect must be given to a term of art unless a contrary intention is shewn by the context with judicial certainty. There is no such context in this will. The subsequent words of the will providing for the case of there being two or more of the same degree of consanguinity—an event which has not happened—do not modify the previous expression except to the extent that where the heir is constituted by a dual or triple personality the eldest male is to be taken. There being no person who answers the description of the devisee given by the testator, the gift in remainder fails. Alternatively the gift is void for uncertainty.

2. Assuming the expression "nearest male heir" means nearest male relative, the person to take is to be ascertained at the testator's death. In dealing with a devise of real estate the Court, if it can do so without deciding in direct opposition to the terms of the will, will give to the devise a construction which will vest the estate at the earliest possible moment: Hawkins on Wills, 1st ed., p. 237; *Duffield* v. *Duffield* (5); *In re Bennett's Trust* (6); *Hickling* v. *Fair* (7); *In re Finch* (8); Jarman on Wills, 6th ed., vol. ii., p. 1404. The last clause of the will, which alone contains any indication that the vesting shall be postponed, is too vague for that purpose. *In re Maher* (9) is an authority in the respondent's favour on both points.

Hughes, K.C., in reply. Lord Coke's rule is discredited by Lord Cowper in *Newcomen* (or *Brown*) v. *Barkham* (10), and it was there held to be inapplicable. That case was reheard (sub nom. *Newcoman* v. *Bethlem Hospital* (11)) by Lord Hardwicke, who, confining himself to the particular will, came to the same conclusion. In *Darbison* v. *Beaumont* (12) and *Chambers* v. *Taylor* (13) also the rule was not followed.

(1) (1846) 9 Q. B. 328.
(2) (1843) 9 Cl. & F. 606, at p. 685.
(3) (1787) 3 Bro. P. C. 454.
(4) (1836) 2 Keen, 230.
(5) (1829) 1 Dow & Cl. 268, at p. 311.
(6) (1857) 3 K. & J. 280.
(7) [1899] A. C. 15.
(8) (1881) 17 Ch. D. 211.
(9) [1909] 1 I. R. 70.
(10) (1716) 2 Vern. 729; Pr. Ch. 442, 461.
(11) (1741) Amb. 8.
(12) (1714) 3 Bro. P. C. 60; 1 P. Wms. 229.
(13) 2 My. & Cr. 376.

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The House took time for consideration.

April 6. LORD ATKINSON. My Lords, this case was most ably argued by counsel on both sides, and every assistance possible given by them to your Lordships. The testator, the construction of whose will is the matter of controversy in the case, Thomas Chichele Bargrave Watkins, having by that instrument devised to his maternal aunts the property he had inherited from his mother, devised the residue of his real property to a trustee in trust to pay the rents thereof to one Herbert Hartland Maybery for his life, and from and after his decease to "convey, assign, and assure the same to his 'nearest male heir.'" Stopping there for a moment, it is not disputed that this trust is an active trust and that the legal estate in the land is vested in the trustee. The main contention of the respondent was this: (1.) that the term "heir" is a technical term, a term of art; that since Lord Coke's time the expression "heir male" has been taken prima facie to mean, when used in a will, the "heir general" of the testator or person indicated provided he be a male; (2.) that the word "nearest" is mere surplusage, is merely equivalent to "next"; and (3.) that "male heir" is the same as this technical expression "heir male," and should have the same meaning given to it. It would appear to me that this third proposition by no means follows. Where under a rule of construction, however unreasonable in itself, a certain meaning has for a long time been given to a technical term, it may be necessary to continue to apply that rule rather than by departing from it disturb the titles to property; but it is quite a different proposition to say that one must give to a mutilated or inverted form of this technical expression the same force and meaning as, under this rule of construction, has been given to the correct technical expression itself. The technical expression to which Lord Coke's rule of construction applied was "heir male." And for myself, I can see no reason why a rule so artificial and in itself so contrary to natural reason as this rule has been described to be should be applied to any other than the strict technical term in reference to which it was first laid down.

In *Brown* v. *Barkham* (1) lands were devised in trust to convey the same to the heirs male of the body of B., the testator's great-grandfather. One C. was the heir male of the body of B., but not the heir general, there being a daughter of an elder brother who was the heir general. It was held, however, that the trustees should convey to C., because, as he would be entitled to take as heir male by descent, he would be sufficiently described to take by purchase. It was not disputed that Lord Coke's rule has been trenched upon where the devise is to the heirs male of a man's body as purchasers, and I only refer to the case for the purpose of citing the criticism of the then Lord Chancellor, Lord Cowper, on Lord Coke's rule itself. He is reported (p. 461) to have said "that naturally and according to the common unprejudiced reason of mankind, every one at first reading of this will, would be clear of opinion, that the testator's intent in this case was to give his estate to his heir male, and none but a lawyer, or one whose judgment is biassed with the learning of the law, could possibly understand it otherwise; but since resolutions of law, and decrees of equity have from time to time established certain rules and artificial modes of property, he thought it necessary to consider such of them as had been cited and made use of to disprove this natural construction of the will, before he gave his own judgment." The Lord Chancellor, having dealt with the rule laid down in *Archer's Case* (2), nemo est heres viventis, said: "A second objection has been made, that he who takes as a purchaser by the name of heir male, must answer the whole description, that is, he must be both male and heir, which the defendant Barkham is not; but this is a rule which has no foundation in natural reason, but is raised and supported purely by the artificial reasoning of lawyers; and under this head we may consider the principal case of *Counden* v. *Clerk* in Hobart (3) and *Ashenhurst's Case* (4) cited at the end of that case, and also the case of *Sterling* v. *Ettrick* (5) in this Court, in all which cases it is observable,

(1) (1716) Pr. Ch. 442, 461; 2 Vern. 729 (sub nom. *Newcomen* v. *Barkham*).

(2) (1597) 1 Rep. 66a.

(3) *Counden* v. *Clerke* (1614) Hob. 29.

(4) *Ashenhurst's Case* (1609), cited Hob. 34.

(5) *Starling* v. *Ettrick* (1695) Pr. Ch. 54.

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1st, that the limitations were only to the heirs male, not saying heirs of the body." I have verified these references. They completely support the statement of Lord Cowper.

Your Lordships have not been referred to a single case decided in the two centuries almost which separate us from the year 1716, when this case was decided, in which Lord Coke's rule was applied, where the expression was other than "heir" or "heirs male," or "heir" or "heirs female."

Mr. Hughes insists that there is no such case in existence. I quite admit that (to use Lord Cowper's words) "naturally and according to the common unprejudiced reason of mankind" no difference could be found between the terms "male heir" and "heir male," but then neither common sense nor the common understanding of ordinary language, nor the unprejudiced reasoning of mankind, appear to have had much share in the shaping of this rule of Lord Coke's itself, and cannot well be appealed to either to patch up a disjointed technical term or right its inverted position. The vitality of the rule is due, not to its merits, but to the mere fact that it has been extensively applied. But for this circumstance it would probably, I think, have long since been disregarded as a guide to the construction of documents. I confess I have some sympathy with Mr. Hughes when he urges that if an artificial and technical rule is pressed against him, and the rigid and technical meaning of a term of art insisted upon, the play should be conducted, as he styled it, according to the rigour of the game, and a term which is different from the term of art, though perhaps its commonsense equivalent, should not be treated as if it were that very term of art itself, and given the same technical meaning and operation. In the view I take of this case, however, it is not necessary for me to express a definite opinion on this point.

This decision of Lord Cowper came up for review in the year 1741, before Lord Hardwicke, then Lord Chancellor, in the case of *Newcoman* v. *Bethlem Hospital.* (1) In delivering judgment upholding the decree of Lord Cowper, Lord Hardwicke said: "There is a distinction between taking by descent and by purchase; in case of the former, it is sufficient to be nearest in

(1) Amb. 8.

descent, claiming all along through males, notwithstanding an heir female be heir general, and this by the Statute de donis; but to take by purchase, he must be heir general, as well as heir male; agreeable to this is Co. Litt. 24b, which is transcribed from his own argument in *Shelley's Case*. (1) To overthrow this general rule, two things have been advanced: 1st, That the original authority has not been rightly understood or expounded: 2ndly, That such a rule is contrary to natural reason, and in that the counsel have followed Lord Cowper. If the matter had been res integra, and to be considered as at the time of making of the decree, I should have been so convinced by the argument and distinction of Lord Cowper, as to have been of the same opinion; but when rules are laid down in books, though they may not have much reason in them, yet it is sufficient they are known; and I shall be very tender in setting up my opinion in contradiction to them."

Lord Hardwicke then goes on to shew that there may be exceptions to this rule, by reason of the intention of the testator appearing manifest in his will. He cites and criticizes many of the then existing authorities, quotes, apparently with approval, the saying of Lord Hobart, that judges ought to be astute to find out reasonable distinctions to unreasonable rules, and ultimately decides that it was the primary intent of the testator in the case, Sir Edward Barkham, to preserve the residue of his estate in the male line of the family, because he, being the great-grandson and heir general of his great-grandfather, Sir Robert Barkham, and by order of descent on the pedigree, nobody could be heir general of the great-grandfather without being also heir general of the testator; yet he limited the devise to the heirs male of the great-grandfather before his own right heirs, by which he plainly intended that the heirs male of the great-grandfather should take in opposition to the heir general of the great-grandfather, which amounted to the same thing as if the testator had said the heir male of the great-grandfather shall take, though he be not heir general. He accordingly held that this expression of the testator's intention took the case out of the reach of Lord Coke's rule.

(1) (1578-9) Dyer, 374.

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In *Winter* v. *Perratt* (1) a testator who died in 1787, by his will in 1786, amongst other things, demised certain lands, failing certain other limitations, to "the first male heir of the branch of his uncle R. C.'s family, who lived at H., yielding and paying to such of the daughters of the aforesaid R. C., which should be then living, the sum of 100*l.* each, at the time of taking possession of aforesaid estates." R. C. predeceased the testator by six years leaving no son, but five daughters, all of whom were married, all of whom survived the testator, and one of whom, the fifth, was living in 1832, the date of the hearing of the appeal, and had a son, born in 1772, also living.

The eldest daughter died in 1799, leaving no son, but a younger daughter, who had a son born in 1795, was as well as her son still living. The second daughter died in 1820, having one son, born in 1763, who died in 1817, and another born in 1770, still living. The third died in 1813, leaving two sons, one born in 1771, who died in 1813, the other born in 1773, and still living. The fourth died in 1804, leaving a son, born in 1768, who died in 1819, having devised to his wife in fee.

Lord Brougham (supported by five judges) was of opinion: (1.) that the words "first male heir" were not used to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor in the technical sense; and (2.) that the first remainder vested on the death of R. C.'s fourth daughter in 1804 in her son.

Lord Cottenham (supported by six judges) was of opinion that the words "first male heir" were used of a person of whom an ancestor might be living—that is, not in its technical sense—and that the remainder did not vest in the son of R. C.'s fourth daughter. The case was elaborately argued by counsel, was fully discussed by the several judges who delivered judgments, and all the authorities were cited.

Tindal C.J. at p. 678 says that he was satisfied the testator did not use the expression "male heir" in its strict legal sense, but in its popular acceptation as an "heir male apparent" or "male descendant." He proceeded to say that he agreed "that where the devisor uses a technical term, it must be construed strictly

(1) 9 Cl. & F. 606.

unless a plain intent to the contrary appears on the will itself." And Lord Cottenham at p. 713 said: "It appears to me, in the first place, that it is contrary to principle, after holding that the terms used must be construed according to the popular sense and not according to the technical meaning, to depart from that rule, and to restrain a popular expression within a rule of law purely technical; secondly, that in the present case there is sufficient upon the face of the will to prove that the testator did not use the terms according to their technical meaning, but in a popular sense—the heir of a line, branch, or family, and not of any individual, and that there are provisions sufficient to include the heir of a living parent; and, thirdly, that the adoption of the technical meaning of the term 'heir' as the ground of construction, might, upon many suppositions, have led to consequences which the testator could not have intended, and, on some, have defeated the devise altogether." This last observation is particularly applicable to the present case.

In *Doe* v. *Angell* (1) Lord Denman C.J. states the rule established by the antecedent authorities thus: "We do not think it necessary to examine minutely all the authorities on this much litigated question. The cases of *Wills* v. *Palmer* (2) and *Goodtitle dem. Weston* v. *Burtenshaw* (3) are relied on to shew that the rule laid down by Lord Coke in Co. Litt. 24b has been altogether destroyed. But it is not necessary, in this case, to go so far. It must be admitted, on all hands, that the rule is modified, as stated by Lord Hardwicke, in *Newcoman* v. *Bethlem Hospital* (4); so that, unless there be some circumstances to take a case out of the rule, a claimant must shew himself heir general as well as male, but that there may be such plain indications of a contrary intention in the testator as to take a case out of the rule." In that case it was held that there was such an indication of a contrary intention. In *Chambers* v. *Taylor* (5) Lord Cottenham at p. 385 refers, apparently with approval, to the statement of Mr. Hargreave in his note to Co. Litt. 24b and

(1) 9 Q. B. 328, at p. 351.
(2) (1770) 5 Burr. 2615.
(3) (1772) Fearne on Contingent Remainders, 10th ed., vol. i., App. No. 1, p. 570.
(4) Amb. 8.
(5) 2 My. & Cr. 376.

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164a, note 2, to the effect that Lord Coke's rule only applies to cases in which the words "heir male" or "heir female" stand unexplained by other words or circumstances, and that he (Mr. Hargreave) considered that the rule was much shaken, if not altogether destroyed, by the later decisions. Lord Cottenham, however, appears to qualify his concurrence with Mr. Hargreave by citing Lord Mansfield's statement in *Goodtitle dem. Bailey* v. *Pugh* (1) that, "since *Newcomen* v. *Barkham* (2) the doubts about the necessity of being very heir have been at an end."

The result of the authorities would appear to me to be this, that while Lord Coke's rule has not become obsolete, and is still to be applied as a rule of construction, it is not to be applied so rigorously as formerly, and that an indication of a testator's intention, in his will, much more feeble and less specific than the "demonstration plain" referred to by Lord Brougham in *Winter* v. *Perratt* (3) or "the plain and undeniable intention" referred to by him (p. 694) not to use the word "heir" in its technical sense, is quite sufficient to put the particular instrument beyond the reach of this rule.

The question, then, is, Do the words used by the testator in this will indicate that he used this word "heir" in a sense other than, and different from, its technical sense? The answer to that question can only be satisfactorily given after one has, as it is said, put oneself in the testator's chair, meaning thereby, has taken into consideration the kindred whose existence was known to him, the circumstances which he knew, or must be assumed to have known, surrounded him, and has read all the provisions of the will taken together; for it is by the will taken as a whole that his intention is revealed.

Somewhat like the writer described by Byron as having just enough of learning to misquote, the testator seems to have been just sufficiently acquainted with technical terms to misapply them. The passage in the will immediately following the point at which I stopped clearly indicates, to my mind, that he did not

(1) Fearne on Contingent Remainders, 10th ed., vol. i., App. No. 1, p. 573 (reversed in H. L. 3 Bro. P. C. 454; see 2 Mer. 348—9).
(2) Amb. 8; Pr. Ch. 461.
(3) 9 Cl. & F. at p. 699.

mean to use, and did not use, the word "heir" in its technical sense at all. The passage runs thus: "and should there be two or more in equal degrees of consanguinity to me, then I direct the said Henry Oxenford Aveline Maybery to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my said eldest male relative."

I think it is clear that the person described as the eldest of his male kindred is intended to be the same individual as is described as his "eldest male *relative*." These descriptions are convertible, and to this person it is intended to limit an estate tail or an estate in fee, whichever it may be. But this tenant in tail or tenant in fee, whichever it be, is in addition to occupy a position which, according to the technical meaning of the language used, no human being could occupy. He is to be a male heir of the testator, and he is to be on an equal degree of consanguinity to the testator with two or more other males, each of whom must also himself be an "heir" of the testator.

If the word "heir" be taken in its technical sense the whole passage seems to me to be arrant nonsense. No man can have two "heirs" in the technical sense of the word. The testator contemplates that he might have two or more, all standing on the same level of consanguinity. Any number of coparceners, or their descendants, make but one heir—that is elementary. The testator, therefore, in this passage of his will aimed, I think, at bestowing his bounty on one member of a class of persons, namely, the eldest of the class, and in my view he meant to describe that class indifferently by the words "kindred" and "relatives." However difficult it may be to determine who may be the members of the class, it is, I think, clear that the indication by the testator of such an intention as this excludes the application of Lord Coke's rule, and makes it impossible to hold that the testator ever meant by the use of the word "heir" to designate his heir general, being a male.

From the pedigree it appears that at the time he made his will in the year 1880 his nearest relative on his father's side was his aunt Mary Jane G. Watkins, a married woman, now alive, and having no issue. She was then, and is now, his heir general.

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He had in the next degree three first cousins, all in existence at the date of the will and all alive at his death. One of these cousins, a Mary Watkins, is still a spinster; another is married but has no issue; and the third, Elizabeth Watkins, still alive, married a gentleman named Morgan Powell Williams, and has now living children and grandchildren. Her only son, Lewis Watkins Powell Williams, was in existence at the date of the will, and, dying on January 2, 1901, survived the testator, but predeceased the tenant for life, Maybery, as the latter died on October 12, 1910, so that at the date of the will the testator's one male relative on his father's side was his first cousin once removed, Lewis Watkins Powell Williams, but of course it was quite possible that his cousin, Elizabeth Williams, might, before the decease of the tenant for life, have had other sons born to her, or that his cousin, Mrs. Le Grouchy, might have a son or sons born to her, or that his third cousin, Mary Watkins, might marry and have male children. All of these male children would have stood to the testator in the same degree of relationship as Lewis Watkins Powell Williams, namely, first cousins once removed. As these were all possible occurrences, ordinary incidents of domestic life, I fail to see how it can be assumed that the testator might not have had them in his contemplation. And if he had them in his contemplation it would be but natural that he should have sought to shape his disposition of his property with regard to them. His will discloses no intention whatever to confer any benefit on any of his female relatives on his father's side. His aim was to benefit but one of his male kindred, to confer upon that member an estate in tail or in fee, and to secure that if the class to which the latter belonged contained two or more members in equal degrees of consanguinity to him the eldest of these should take. The word "heir" was, I think, inartistically and inaccurately used in a popular sense to indicate the member of this class who would be his heir if female relatives were altogether excluded.

The last clause in the will, declaring what, no doubt, is a merely precatory trust, is, of course, just as clear and forcible an indication of intention as if the trust was a valid and binding one. It shews clearly that the person for whose benefit the

property was to be kept in repair by the tenant for life was only to be ascertained at the death of that tenant for life. It certainly looks to me as if the testator contemplated that the class from which the beneficiary was to be selected might alter in its composition during the lifetime of the tenant for life, as it certainly would have done had these male children been born to his female first cousins, and he therefore postponed the period of the selection of the beneficiary until the time when the actual possession and enjoyment of the estate devised should pass to him. By this clause the testator obviously did not intend to make a new disposition of his estate, but merely to indicate when the person he had already made the object of his bounty should be selected or ascertained. I am fully alive to the great desirability of the early vesting of such estates as were devised by this will, and can well understand that a construction which would lead to that result should, if possible, be preferred to another which would postpone the vesting, but a testator can postpone the vesting of the estate he devises if he be disposed to do so, and however great the evil, his intention, if clear, must be given effect to.

I do not know how he could more effectually shew he was disposed to do this than by expressly stating that the person who is to take the benefit of estate in remainder after the termination of an estate for life is to be the person who shall then stand to him, the testator, in a particular relation. Is not this practically what is provided by this clause? If the estate devised, whether it be an estate tail or an estate in fee, vested in the person entitled at the testator's death, the person interested in it when the tenant for life died might be the assignee of the beneficiary, an entire stranger and not of the kindred of the testator at all.

In my opinion, this provision would be defeated by holding that the estate vested at the testator's death. On the whole, therefore, I think that there was no intestacy as to this estate, but that on the death of the tenant for life on October 12, 1910, it vested in the appellant, who, as far as appears by the pedigree, was the only male relative of the testator then alive, and was the person who, if Mary Jane Watkins be, like all other female relatives, excluded from consideration, as I think that the

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testator intended that they should be, would be the testator's heir.

In my opinion, therefore, the decision of the majority of the Court of Appeal was erroneous and should be reversed, and it should be declared that the appellant is entitled as devisee under the will of the testator to the real estates thereby devised; and, as the difficulty in the case entirely arose from the act of the testator in making this complicated will, the costs of both parties should be paid out of the assets.

LORD SHAW OF DUMFERMLINE. My Lords, by the will of the late Thomas Chichele Bargrave Watkins he devised the residue of his real property in trust to pay the rents and profits thereof yearly to Herbert Hartland Maybery, "for the term of his natural life, and from and after his decease to convey, assign and assure the same unto my nearest male heir, and should there be two or more in equal degrees of consanguinity to me, then I direct the" trustee "to convey, assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my said eldest male relative." Later in the will occurs this clause: "I desire the said Herbert Hartland Maybery neither to mortgage nor anticipate in any manner the said annual income, whatsoever the amount may be, paid into his hands by his said brother," the trustee, "and I confidently expect him to aid and assist his said brother in keeping my real property, which I have devised to him for the term of his natural life, in fair and tenantable repair"—such repair as his brother, the said trustee, may think necessary—"for preserving the value of the property, and keeping up the remainder in trust for my nearest and eldest male relative who shall be such at the time of the decease of the said Herbert Hartland Maybery."

There are two questions in the case. They are separate, but, in my opinion, the answer to the first has a certain bearing upon the reply to the second. The first question is: What was the period of vesting of the remainder of this estate here conveyed in trust? The second is: Who is the person who falls

within the description or descriptions covered by the variety of terms employed in the will?

On the first of these questions I have not any substantial doubt, and I humbly think that the conclusion reached by the learned Lord Justice Buckley was correct. In the view which I hold, it is not legitimate, with language such as is employed in this will, to import any presumptions whatsoever into it with regard to the vesting period. I cannot acquiesce in any part of the argument which seemed to point to a preference for vesting a morte testatoris. The conveniences which attach to that construction are sometimes so manifest that they point a clear line for what may be assumed to have been the true intentions of the testator. But I think there are no indications, so arising, in the present case.

When the testator refers to keeping the remainder "in trust for my nearest and eldest male relative, who shall be such at the time of the decease of the said Herbert Hartland Maybery," it seems to me to be clear that the process of searching for the person who takes under this will in remainder is fixed for a certain specified time, namely, Herbert Maybery's decease. To have searched for and selected a remainderman earlier, and then to have supposed that there were vested rights in the person so selected, might have one of two consequences. Either, first, the remainderman so selected would be different from the remainderman specified in the period of selection in the will, and, therefore, the right in remainder would be subject to being divested in favour of the true remainderman as at the period fixed by the will; or, secondly, the vesting in the remainderman selected at a preceding period would cut out the remainderman who survived Herbert Maybery. It is highly expedient to translate these situations into plain language, and I cannot reconcile it with a fair construction of this will as a whole to hold that the vesting of the remainder of this real estate took place prior to the period specifically set out as that at which the remainderman was to be found. The remainderman was "the nearest and eldest male relative who shall be such at the time of Herbert Maybery's decease." I do not think the remainder ever was or could have been deemed vested prior to

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the period when the specific remainderman could have been ascertained.

It is no doubt true that the section of the will in which this clause occurs has been held to contain only the expression of a desire, that the words are merely precatory, and that the hope and expectation of the testator that the tenant for life would keep up the property for the benefit of the remainderman who would succeed at his death cannot be construed as words of effective obligation upon the tenant for life. With the greatest respect to the learned judges of the majority of the Court of Appeal, I do not think that this is a ground for discarding this considerable section of the will, when the process in which one is engaged is that of ascertaining what was the real intention of the testator on the subject of the vesting of his estate. The greatest light on the testator's intention may often be found in the course of sections of his testamentary writings, which by themselves do not set up binding obligations. In my humble view the safe course is to take the will as a whole, with all the light which all the parts of it can throw upon the intentions of the testator, just as these parts are found. And, on the other hand, it does not appear to me to be safe to postpone the construction of a document until certain operations of mutilation, amputation, and piecing together of its remnants have been performed.

The second question is—the selection of the person who is to take this remainder being necessarily postponed, and the vesting being also postponed to the death of the tenant for life—who is the person so to be selected? He is variously designated. The term primarily employed is "my nearest male heir." The next term employed applies to the possible case, in my view, of coparceners, "should there be two or more in equal degrees of consanguinity," and in that case the conveyance is to be to "the eldest of my male kindred." The third term employed is "my said eldest male relative"; and in the fourth and last place the term employed is "my nearest and eldest male relative."

My Lords, again I think the same principle must be applied, that the intention of the testator is to be read by taking the whole of these terms so as to find such a meaning from them as

they unitedly, if possible, will bear. I am clearly of opinion that no vox signata was employed in this will. "Heir" one can understand as having a definite signification; "heir male" one can similarly understand. But neither "male heir" nor "nearest male heir" has a limited or special signification according to any lines of preference or presumption under the law of England. It is, therefore, not a case in which the language used need be artificially specialized; and the proposal which was so powerfully argued by Mr. Younger, to affirm that the term "nearest male heir" means in this will the heir general on the testator's father's side being a male, is one which I cannot accede to.

It is not necessary to make any pronouncement as to whether that consequence would have followed had the expression "heir male" and nothing else been employed, because that expression is nowhere employed in the will, and, on the contrary, there must be a combination of four expressions in order to ascertain whom the testator had in mind. The case vividly recalls the observations of Cowper L.C. in *Newcomen* v. *Barkham.* (1) The same principle there announced—a recoil against a technical construction and a reversion to the words of the individual will in order to perform the operation of ascertaining the testator's intention—has in recent years been strongly followed by Lord Halsbury. But it is no new principle, and I refer to the case of *Darbison* v. *Beaumont*, reported in 1 P. Wms. 229, at p. 232, in this way: "Since the law had given to this word" (the word "heir") "several senses, it would be hard to expound it in that which was the strictest, and most rigorous, and would destroy great part of the will; at the same time, that by law it might have another sense, which would support the whole will and intent of the party. That the intent of the party being the principal rule for the exposition of a will, the testator was excused from using the strict and proper terms and phrases of law, and had liberty to use such expressions as he pleased; for, provided they were such as sufficiently declared his intent, it was enough; and his intent should take place, if by any possibility consistent with the rules of law."

(1) 2 Vern. 729.

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The question, therefore, is: The date of vesting having been as stated, what had to be done at the death of Herbert Hartland Maybery to ascertain who was the person who fell within this combined category? I think that what had to be done was this. In the first place, to look round among the kindred and relatives and to ascertain all who would be embraced within the category of "heirs." The next operation was—from amongst all these—at once to exclude females; and having then reached the class confined to "male heirs," to take among these the one who was nearest in degree to the testator. If that operation be performed the appellant has no rival in the succession. The choice falls upon him. I see no reason why it should not. He is exactly the person whose selection violates none of the terms employed, if the date of vesting and selection be the death of the tenant for life.

The argument against this is that the testator, both at the date of the will and at the date of his death, had one relative in existence, namely, Mary Jane Gwenllian Watkins, a cousin, the daughter of a paternal uncle. She came, so to speak, in front of all other claimants who bore the category of heir, because she was de facto the testator's heir general. In that capacity she absorbed, quoad this will, the term "heir." No person who was not the heir general could possibly take, and she, who was the heir general, being a female, could not take herself. The result of the contention, accordingly, is that the testator's entire efforts have been baulked when he searched for an eldest male relative or an eldest of his male kindred, or a nearest male heir to take his property, because such an operation is—so is the argument—impossible so long as Mrs. Mary Jane Watkins in her character of heir general, and alive at the dates of his will and his death, prevented all such testamentary writings by him having any effect.

The mind never inclines towards intestacy; it is a dernier ressort in the construction of wills; but I do not remember a case in which intestacy was pleaded as having been procured by the existence of a female relative whose position in law was such as to render abortive all the variety of terms which the testator had employed in search of a male heir. It may be somewhat

Hibernian, but the construction sought is apparently one which would lead one to conclude that this testator was struggling to be intestate. I do not think that he was, and I think that the language which he has employed does by a combination of the terms result in the selection of the appellant, who accordingly is entitled to succeed in the appeal.

I agree with the result at which your Lordships have arrived.

LORD MOULTON.(1) My Lords, the will which in this case your Lordships have to interpret is so badly drawn that more than once during the argument of the case I have found myself seriously considering whether your Lordships ought not to treat the provisions with which we are now concerned as being wholly unintelligible. In the end, however, I have come to the conclusion that one can so read them as to express the intention which I have no doubt was that which the testator desired to express, although he has shewn himself singularly incapable of clothing it in accurate or consistent phraseology.

In construing the part of the will which for our present purposes is the operative part we have the assistance of a later clause which, though not directly affecting the provisions in question, throws considerable light on the signification of the language used. This latter portion of the will has been declared to be legally inoperative, and in some of the judgments in the Court of Appeal there seem to be indications that this fact influenced the Court and led them to discount the value of the assistance which it gave in the interpretation of the will as a whole. I am unable to understand why this should be so, and in the argument before your Lordships no attempt was made by counsel for the respondent to support this view. I therefore take the two relevant passages of the will as a whole, paying no heed to the question whether the provisions of the later passage are capable of enforcement or not.

The testator, after certain bequests, devises the residue of his

(1) Per incuriam this opinion was not read ; but on the following day the Lord Chancellor moved that the opinion should be handed in and form part of the record.

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real property to a trustee to pay the rents and profits thereof yearly to Herbert Hartland Maybery for the term of his natural life. And from and after his decease to convey, assign, and assure the same unto the testator's "nearest male heir."

I stop there for a moment because I consider that this expresses the main intention of the testator, and that the complicated directions which follow are subordinate thereto, destined to deal with cases where there is no single person who exclusively satisfies that description. And, further, I am of opinion that when we have arrived at the meaning of the phrase "my nearest male heir" we shall have substantially solved the enigma of the will. It is about these words that the battle has raged before your Lordships. But there is this striking difference between the contentions of the appellant and the respondent respectively. The argument on behalf of the respondent reduces itself to saying that your Lordships are bound by decisions to give to these words one meaning and one only, namely, that it means the "nearest heir if male." The argument on behalf of the appellant is that it indicates that the testator had in his mind a class from whom you must select the nearest male. In truth the point in issue is, in my opinion, decided so soon as your Lordships have determined whether or not you agree with the view of Buckley L.J. when he says, "It seems to me to be quite plain that the testator was contemplating a state of things in which there are, or may be, a plurality of heirs, and the person who was to take under the first gift is the nearest male heir."

My Lords, I am of opinion that Buckley L.J. was right in so interpreting the words. Apart from the difficulty that undoubtedly exists in determining the meaning of the word "heir" when thus used, it cannot be doubted that in their natural signification the words of the will imply the choice of one member from the whole of a class. Grammatically considered, it is impossible to regard them as meaning "my nearest heir if male," as counsel for the respondent would suggest. If I ask my groom to bring me the oldest white horse in my stable, no one would interpret that as meaning that he was to bring the oldest horse if it chanced to be white, and that I had directed him not to bring any horse if the oldest horse happened to be a

bay horse. But the conclusion that the testator was intending the selection of one member from a class is strengthened by the fact that all the other references in the will to the person selected contemplate the selection of one out of a class, though the description in each case, if construed strictly, corresponds very imperfectly with the initial description. This inaccuracy of expression, however, does not weaken the evidence that the language of the will furnishes, that the testator in using the word "heir" in the phrase "my nearest male heir" is not using it in the strict sense in which a man can only have one heir, but in the general and more inaccurate sense of "persons capable of inheriting from me," that is to say, "my kindred."

This is made much clearer as we proceed with the words of the will. After the bequest of the residue to the testator's "nearest male heir" it occurs to him that there may be "two or more in equal degrees of consanguinity" to him, and in such case he directs that the eldest shall be preferred. I can have no doubt that this is the meaning of the language used, although the actual language, "unto the eldest of my male kindred," expresses it very inaccurately, and the matter is not much improved by his subsequent reference to the person as "my said eldest male relative." The testator seems to have been obsessed by a desire never to repeat the same phrase even when referring to the same person, a rule which may tend to elegance in literary style, but which is lamentably unsuitable in the drafting of a will. His final reference to the person in question is "my nearest and eldest male relative." Taken with the context, I have no doubt that this means "my nearest, and if two are equally near, then of them the eldest relative." Throughout the will the testator appears to me never to have departed from his intention of leaving the property to the nearest male successor, and I am of opinion that the reference to the "eldest" is only intended to come in where there is no single person who exclusively satisfies the description of being nearest in succession, and in such case age is to decide between the rival claimants.

The argument on behalf of the respondent depended solely on the proposition that, upon the authority of Lord Coke, "heir male" is a term of art signifying "heir general if male," so that

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upon a gift to one's "heir male" the gift fails if the "heir general" happens to be a female. My Lords, I do not propose to discuss the authority of this proposition. It appears to me to have been criticized very seriously almost from the date of its enunciation, and though there are undoubtedly cases in which it has been followed, there has been a strong tendency to allow small indications to justify a departure from the rigour of the rule. But, my Lords, the present case is not an instance of the use of a recognized term of art. The justification for ascribing rigorously to a recognized term of art its technical meaning rests upon the reasoning that the fact that that special term has been chosen makes it probable that it was intended to have its technical meaning. The force of this reasoning disappears when that which is used is not the term of art, but something which is different, even though, grammatically considered, it might appear to be substantially equivalent thereto. The persons who knew the term of art, and wanted to avail themselves of its technical certainty, would have used the exact term of art, and not have departed therefrom and used some other form. I am satisfied that no person would have used the phrase "my nearest male heir" in the belief that he was protected by a doctrine that the phrase "heir male" meant "heir if male."

I am therefore of opinion that the testator intended the residue, after the death of the life tenant, to pass to the male nearest in succession to him, or, as he phrased it, "my nearest male relative." But there is a further question which has to be decided. At what moment of time is that person to be selected? Upon this point I cannot say that I have at any time felt any doubt. The later paragraph of the will is directed to securing that the life tenant shall keep up the property in fair and tenantable repair, or, as the testator describes it, "keeping up the remainder in trust for my nearest and eldest male relative who shall be such at the time of the decease" of the tenant for life. Now it is obvious that the keeping up of the property could only be for the benefit of the person who was to succeed, and therefore that person was to be the one who was at the decease of the tenant for life his nearest and eldest male relative. To my mind this proves clearly that he intended that the selection should be made

at the death of the tenant for life. This conclusion in no way clashes with the operative devising clause, but, on the contrary, harmonizes entirely with it. That clause directs the trustee to "convey, assign, and assure" the property to the testator's nearest male heir. These operative words point to the recipient of the property being a person then living, and although, if standing alone, they might not perhaps suffice to make it clear that the selection was to be made at the death of the life tenant, they harmonize with and confirm that which, in my opinion, is the necessary interpretation derived from the later clause of the will.

For these reasons I am of opinion that the appeal should be allowed.

Order of the Court of Appeal reversed and declared that the residuary real estate of the testator vested in the appellant at the death of Herbert Hartland Maybery, the tenant for life. The costs to be paid by the respondent Lucy Powys Maybery out of the proceeds of sale of real estate of the testator in her hands.

Lords' Journals, April 6, 1914.

Solicitors for appellant: *Davenport, Cunliffe & Blake, for Davenport & Rose, Oxford.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Jeffreys & Powell, Brecon.*

[HOUSE OF LORDS.]

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SHEARER AND ANOTHER . . . . . APPELLANTS;

AND

SHIELDS . . . . . RESPONDENT.

False Imprisonment—Scottish Procedure—Issue—Arrest by Constable without Warrant—Reasonable Grounds of Suspicion—Malice and Want of Probable Cause—Privilege—Glasgow Police Act, 1866 (29 & 30 *Vict. c. cclxxiii.*), *s.* 88.

The Glasgow Police Act, 1866, s. 88, empowers constables within the city to take into custody without any other authority than the Act any person "who is either accused or reasonably suspected of having committed" a penal offence.

In an action of damages for wrongful apprehension against two Glasgow constables who had arrested the pursuer on suspicion without a warrant:—

Held, that malice in fact need not be proved by the pursuer; and an issue whether the defenders "wrongfully and illegally and without reasonable grounds of suspicion" apprehended the pursuer approved.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 1012, affirmed.

APPEAL from interlocutors of the sheriff-substitute of Lanarkshire and the Second Division of the Court of Session in Scotland. (1)

The appellants were police constables of Glasgow. The respondent was a labourer who resided in County Donegal.

On November 30, 1912, the respondent raised an action in the sheriffdom of Lanarkshire at Glasgow against the appellants concluding for payment of 100*l.* as damages for illegal apprehension.

The substantial question raised by the appeal was whether the averments in the condescendence disclosed a relevant cause of action. The respondent by his condescendence averred that he arrived at Glasgow from Blanefield during the forenoon of Saturday, October 12, 1912, and took lodgings

* *Present:* VISCOUNT HALDANE L.C., LORD KINNEAR, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) 1913 S. C. 1012.

in Stirling Street, Cowcaddens, Glasgow, till the following Monday, when he intended to go home; that on the afternoon of the Saturday he purchased at a hawker's barrow in Great Clyde Street a white metal watch for 1*s.* 6*d.* and paid for it; that he retained the watch in his possession till the Monday following, namely, October 14, 1912, when, being doubtful whether the watch was worth the money he had paid for it, he took it to a watchmaker's and asked the man in charge to let him know the value of the watch, and that he was informed that if he got an offer of 1*s.* for the watch he should accept it, as it was not worth any more (condescendences 2 and 3).

"Cond. 4. The pursuer accordingly took the watch in question to the premises of —— Maguire, broker, Glebe Street, Glasgow, and asked the salesman to buy it from him. The latter after looking at the watch declined to purchase it. While the pursuer was in said shop he observed a man standing in front of the counter in said shop. He did not know at the time that said man was connected with the police force, but he now avers that it was one of the defenders. The latter took the watch from the pursuer and handed it back to him after examining it, stating 'it is not worth anything.'"

"Cond. 5. After the incident referred to in the immediately preceding article, the pursuer left said shop and crossed the street to the shop of J. & A. Ferris, who are general dealers at 51 and 53, Glebe Street, Townhead. He asked the person in charge of said shop (a woman) to buy said watch. The saleswoman examined said watch, asked pursuer what he wished for it, and on his replying 2*s.* made him an offer of 1*s.* 6*d.*, which offer the pursuer accepted, and on receiving payment left said shop."

"Cond. 6. When pursuer left said shop he proceeded in the direction of Stirling Road, Glasgow, which is in the vicinity of Glebe Street aforesaid. While walking along said road he was approached by the defenders who were in plain clothes, who stopped him and asked him what he had done with the watch. Pursuer stated that he had sold it, and on being asked further by the said defenders to show them the shop where he had sold said watch, the pursuer immediately took them to the shop of the said J. & A. Ferris. The said defenders made inquiries of the

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woman in charge, who informed them that it was the fact that pursuer had called at said shop and sold said watch for 1*s.* 6*d.*, and showed them the record of the transaction in her books. She further informed them that she was quite satisfied that the pursuer had come into possession of said watch honestly. The defenders said that they were not satisfied as to this, and insisted on the said saleswoman delivering over to them the watch in question, which she did. With reference to the defenders' averments in answer, the circumstances under which defenders apprehended pursuer as stated in answer are denied, and it is explained and averred that in acting as they did on the occasion libelled the defenders were not acting in the honest discharge of their duties as police constables, but were acting arbitrarily, capriciously, and unjustifiably. The pursuer at no time on the occasion libelled acted in such a manner as to excite suspicion in the mind of any reasonable person."

"Cond. 7. The pursuer was immediately thereafter arrested by the defenders, and marched through the streets to the St. Rollox police office in their custody, the pursuer walking between the defenders and being held by them by his arms. On arrival at said police office the defenders falsely, maliciously, and without probable cause, stated to the official in charge that they had arrested the pursuer on the ground that they had found him in possession of a watch of which he was unable to give a satisfactory account. Thereafter the defenders proceeded forcibly to search him, but found nothing to incriminate the pursuer in any way whatever. He was locked up, and detained in said police office until the following morning, viz., Tuesday, 15th October, 1912. This was done, notwithstanding that the pursuer explained that he had purchased said watch as before stated. It is explained and averred that a list of all watches reported to the police authorities as stolen is in the possession of the various detective officers of the city the morning following the report of their loss. The watch in question was not a stolen watch, nor was it described on the list above referred to, and this was well known to the defenders before and at the time of the arrest of the pursuer by them."

"Cond. 8. On the morning of said Tuesday, 15th October,

1912, the pursuer was brought before the magistrate on said charge, and at the request of the superintendent of police at St. Rollox police court was remanded for enquiry. He was taken back to the cells, and again locked up until the following morning, viz., Wednesday, 16th October, 1912, when he again appeared before the magistrate officiating in said police court, and was discharged."

"Cond. 10. In apprehending the pursuer and conveying him through the public streets of Glasgow to St. Rollox police office, Glasgow, and there lodging a charge against him of being found in possession of a watch of which he was unable to give a satisfactory account, and in thereafter submitting him to the indignity of a search, and detaining him as aforesaid, the defenders acted illegally, unwarrantably, and maliciously, and without probable or any cause. The defenders had no warrant for the apprehension of the pursuer, and were not entitled to apprehend the pursuer in the circumstances condescended on. Furthermore, the charge made by the defenders against him was a false charge, and was made without probable or any cause. The defenders, however, acted arbitrarily and capriciously, and in an unjustifiable manner in the circumstances in respect that they stopped and questioned the pursuer as aforesaid, refused to believe either the statements of the said saleswoman in said shop of said J. & A. Ferris or of the pursuer, and arrested and conveyed him to the police office. This they were not entitled to do, and had they enquired further they would have found that the pursuer was not a thief nor an associate of thieves, and that it was impossible for them to trace stolen property to his possession for the reason that pursuer never was in possession of such property, nor was he ever guilty of the crime of theft."

The defenders pleaded inter alia:—

"1. The action is irrelevant.

"2. The defenders, having been acting as police constables in the honest discharge of their duties under the powers conferred upon them by the Glasgow Police Act, 1866, s. 88 (1), without malice and with probable cause, are privileged."

(1) Glasgow Police Act, 1866 s. 88: "It shall be lawful for the chief constable, or for any superintendent, lieutenant, or constable acting under

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On February 25, 1913, the sheriff-substitute allowed a proof. On March 1, 1913, the respondent appealed for jury trial, and on July 4, 1913, the Second Division (the Lord Justice-Clerk, Lord Dundas, Lord Guthrie, and Lord Salvesen) approved of an issue for the trial of the cause by a jury, in the following terms: "Whether on or about 14th October, 1912, the defenders wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St. Rollox police office in Glasgow, to his loss, injury, and damage? Damages laid at 100*l*."

T. B. Morison, K.C. (Solicitor-General for Scotland) (of the Scottish and also of the English Bar), and *F. A. Macquisten* (of the Scottish Bar) (with them *H. Mackinnon Wood* (of the English Bar)), for the appellants. The appellants in apprehending the respondent were acting under statutory authority and were privileged; they are not liable in damages, even if they have acted wrongfully, unless they have also acted maliciously and without probable cause. To succeed the respondent must prove malice in fact: *Young* v. *Magistrates of Glasgow.* (1) The respondent's record contains no averments of facts from which malice can be inferred against the appellants. If the appellants bona fide believed they had reasonable ground for suspecting the respondent the statute protects them. The issue allowed by the Second Division is not in conformity with Scottish

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or appointed by him, ... without any other authority than this Act, to do any of the following acts within but not beyond the city; viz.,

. . . . . .

"They may search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed, either within the city, or at any place wheresoever beyond the city, a penal offence or any police offence not herein specially directed to be made the subject of a complaint, in respect of which imprisonment may be awarded without the alternative of a money penalty, or any police offence where the name and residence of such person are unknown to the constable, and cannot be readily ascertained by him, or any person actually committing any riotous or disorderly conduct or act, or impeding any public thoroughfare. . . . ."

(1) (1891) 18 R. 823.

law and practice and it ought to be disallowed and the action dismissed.

[The following cases were also referred to: *Pringle* v. *Bremner* (1); *Beaton* v. *Ivory* (2); *Lundie* v. *McBrayne* (3); *Buchanan* v. *Glasgow Corporation* (4); *McCormack* v. *Glasgow Corporation.* (5)]

Roberton Christie, K.C. (of the Scottish Bar), and *T. Scanlan* (of the English Bar), for the respondent, were not called on.

VISCOUNT HALDANE L.C. My Lords, it would be with reluctance that I should criticize a decision come to in the Court of Session on a question of procedure, but on the present occasion I find myself, for reasons I will presently state, entirely in accordance with the views of the learned judges who have decided this case in the Court below; and I am strengthened in my sense of concurrence by the fact that three of your Lordships, who have large experience in connection with Scottish procedure, are of the same opinion. Of the issue as framed I only propose to say that it seems to me, if it is justifiable, a convenient course to have adopted for the bringing to justice of the case before us.

My Lords, the real question seemed to me at a very early stage of the opening of the Solicitor-General for Scotland a question of substance—the question whether it is necessary for the pursuer to prove that malice in fact was in the minds of the police when they took steps which resulted in what he alleges was his false imprisonment.

Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual

(1) (1867) 5 Macph. (H. L.) 55.
(2) (1887) 14 R. 1057.
(3) (1894) 21 R. 1085.
(4) (1905) 7 F. 1001.
(5) 1910 S. C. 562.

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malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated.

My Lords, what has happened in the present case is this: that an issue has been framed under a statute which governs these matters in Glasgow, and an issue which substantially follows the words of that statute. The issue proposed is: "Whether on or about 14th October, 1912, the defenders wrongfully and illegally, and without reasonable grounds for suspicion, apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St. Rollox police office in Glasgow, to his loss, injury, and damage"; and the damage is laid at 100*l*. My Lords, in order to succeed on what is the real question of substance underlying this case the learned Solicitor-General frankly admitted that he would have to say that if the defenders, the police, wrongfully and illegally without reasonable grounds of suspicion apprehended the pursuer, still the pursuer could not succeed without proving that malice in fact which I have distinguished from malice in law.

I asked the learned Solicitor-General, than whom no one is more competent to answer the question, whether he could produce any train of authorities in the Court of Session, or any decision of this House, which introduced what would be a most startling demarcation between the law as it exists in Scotland and the law as it exists here, and he replied with candour that he could not. There was one case, the case of *Young* (1), which we were all agreed was a case which related to a different state of matters. That being so, it appears to me that the issue which has been framed in this case is an issue which really is more favourable to the defenders than the issue which they would normally have were the case treated as one merely at common law; they have got such protection as the statute which prevails in Glasgow gives them. If they can succeed in bringing themselves within the words of justification which that statute enacts, then they will succeed.

My Lords, the conclusion I have come to is that the Court of

(1) 18 R. 823.

Session have taken a very convenient course in this case, a course in which, there being no challenge on the part of the pursuer as to the form of issue, I entirely agree; and I therefore move your Lordships that this appeal be dismissed, and dismissed with costs.

LORD KINNEAR. My Lords, I entirely agree with my noble and learned friend on the woolsack, and I have nothing to add to what he has said.

LORD DUNEDIN. My Lords, I also agree with what has just been said by my noble and learned friend on the woolsack. I think, perhaps, I had better add to what he has said that I think my noble and learned friend has used terms which are not perfectly familiar terms in Scotland; I mean "malice in law" and "malice in fact"; but which are exactly represented, in the cases which have turned upon these matters, by the distinction between cases where malice may properly be inferred from the mere wrongful act that is done, and cases where it is necessary in the Scotch phraseology to aver acts and circumstances out of which malice may be inferred; such a case, for instance, as the case of *Beaton* v. *Ivory*. (1) In other words, to use the words of my noble and learned friend, in *Beaton* v. *Ivory* (1) there would not have been a relevant case against the sheriff principal unless the Court had been able to infer malice in fact, which they were not able to do.

My Lords, the common law upon the question that we have here been dealing with seems to me plain beyond all question. The first point is that in a case of this sort you are bound to take the averment of the pursuer alone, and not the defence which is made by the defender. That was laid down in this House by Lord Chelmsford L.C. in the case of *Pringle* v. *Bremner*. (2) Taking that in this case we find that there are no circumstances according to the pursuer which justify the arrest at all; and, when that is so, I think it is absolutely clear upon the authorities that all that was necessary for the pursuer to put in issue were the words "wrongfully and illegally," without

(1) 14 R. 1057. (2) 5 Macph. (H. L.) 55.

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any more, leaving any question of privileged situation to be dealt with by the learned judge at the trial. The only case that has been quoted against that is the case of *Young* (1), and I am perfectly satisfied that in *Young's Case* (1) the admission of the words "maliciously and without probable cause" in that issue was due to the concession of the counsel concerned, and not consequent upon the matter being argued. There have been countless cases since, not only cases in the books but cases in which one may invoke one's own personal knowledge of procedure, where the pursuer has made averment as here, and the issue was "wrongfully and illegally," and that alone.

Then we come to the question, Does the Glasgow Police Act make any difference, which says that constables are to be allowed to arrest if they have reasonable grounds of suspicion? Upon that clause the appellants here argued that that meant that a constable was allowed to arrest if he said he suspected, and that the mere fact that he said he suspected absolutely closed the question. My Lords, I should be sorry indeed to suppose that the liberties of the subject in Glasgow have been so interfered with as they would have been if an Act of Parliament had been passed with the meaning the appellants put upon it. Upon that point I will only say that I entirely agree with that portion of Lord Salvesen's judgment which deals with that matter.

That being so, the only question that remains is whether it was advisable in this case to alter the old form of issue, and to put in the particular words of the statute. My Lords, I agree with my noble and learned friend on the woolsack in thinking that the course adopted has been quite convenient. I would like to say this, that upon the question of the mere form of the issue, which is merely what is a convenient way of trying the case, I should think your Lordships' House would be slow indeed to interfere with the learned judges of the Court of Session, unless you were thoroughly convinced that what they had done would, in some way or other, lead to a result which would not be in accordance with justice in the interests of either the pursuer or the defender.

I agree in the motion that has been made.

(1) 18 R. 823.

LORD ATKINSON. My Lords, I concur. I have some hesitation in expressing any opinion on a matter of Scotch pleading and practice, but it certainly would appear to me that the issue as framed is more favourable to the defenders than they are entitled to. I think human liberty is such a valuable thing in this country—as in Scotland—that a person who invades it by arresting an individual must justify his action in that respect. The Solicitor-General for Scotland was extremely candid in stating that his quarrel with this issue was that it was not so framed as to place upon the pursuer the burden of proving affirmatively that the act of the constable was done with ill will. I do not think there is any principle of law which would throw that burden upon the pursuer, and I am very happy to say that it is so. I do not think any case was cited before your Lordships which would justify your coming to any such conclusion. I think that the issue as framed practically enables the parties to raise the defence based upon the Glasgow statute, and that there is no sound objection to it.

LORD SHAW OF DUNFERMLINE. I agree. In determining as to an issue the rule is elementary that the allegations of the pursuer must be taken as they stand. The case made is very simple. It is, as alleged, this—that the pursuer, being the lawful owner of a watch, was arrested for having it in his possession.

The power of arrest of a citizen in Glasgow does not appear to me to be in any way different from what it is in other places in Scotland. Very frequently no warrant is required. And of course there are certain protections afforded. In addition to the ordinary rules of the common law, the Glasgow police statute bears upon the subject. I desire, since the case has reached this House, to say that I adopt entirely what I consider, if I may say so, to be the excellent summary of the position given by the learned sheriff-substitute. He says: "By virtue of s. 88 of the Glasgow Police Act, 1866, a police constable has power to arrest without a warrant any person whom he may reasonably suspect of having committed a crime. But it rests upon the constable to prove that his suspicion was reasonable, and his act therefore

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Lord Shaw of Dunfermline.

justifiable. It may quite well be that the defenders here will be able to establish at the proof that the pursuer brought his arrest upon himself by his own furtive and suspicious behaviour, by his giving confused and contradictory accounts of how the watch came into his possession, and the like. If that be so the defenders were doing no more than their duty in arresting him."

I had great difficulty in understanding what it really was that the appellants desired. After a brief argument it was admitted that the pursuer's averments did contain issuable matter. It turned out ultimately that the appellants wished to put into this issue the word "maliciously." The form of the issue is this: "Whether on or about 14th October, 1912, the defenders wrongfully and illegally, and without reasonable ground of suspicion, apprehended the pursuer." To this hour, my Lords, I do not understand what "maliciously" would add to that. For if a constable has arrested a citizen without reasonable grounds even of suspicion against him, the law would demand no further proof of malice. With regard to actions of slander it has long been established that malice is implied by the reckless use of words without any consideration whether they were true or not. And with regard to false or improper apprehension or imprisonment the law is also elementary that malice is implied from recklessness whether the citizen arrested is innocent or not. Accordingly when the statute in Glasgow says that it is no defence unless there is reasonable ground for suspicion, it appears to me that the Act simply lays down in so many terms —in broad and popular terms—what might have been put in the old legal form by the words "maliciously and without probable cause."

The difficulty in this case is said to have arisen from one sentence in Lord Salvesen's opinion. I think it right to call attention to that because it ought to be said, in justice to the learned judge, that that sentence has been misconstrued. No doubt he did say that "the constable who arrests a person without a warrant takes the risk of justifying the apprehension." The learned Solicitor-General for Scotland argued that that must mean that the onus was upon the constable; but the learned

judge in the succeeding sentence shews that that is not so. For he cites the statute and he says: "The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut the presumption"; and he concludes his judgment by saying this, in which I entirely agree: "It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged; and it is desirable that officers of the law should as far as possible be protected in the discharge of their duty by the grounds of their liability being pointedly brought under the notice of the jury." It humbly appears to me that those sentences of Lord Salvesen make clear where the onus lies, namely, that it rests upon the pursuer.

A word, my Lords, with regard to the form of issue. My noble and learned friend has referred to the practice. I am aware that the general or at least frequent practice is that the insertion of the words "wrongfully and illegally" in the issue as presented to the jury is enough. When the pursuer's averments do not shew that the defender was in any position of privilege, this is necessarily so. When thereafter and in the course of the trial privilege is disclosed and determined by the judge, the judge then charges the jury that they must further be satisfied that the action was done maliciously and without probable cause. In these cases therefore, before the jury come to determine their verdict their duty is to consider the black type with "wrongfully and illegally" and to remember (if they can) the judge's charge that they must also find further that the act was done maliciously or maliciously and without probable cause. This course is ex necessitate inexact and might conceivably produce mishap if the jury omitted to recall the judge's charge. But what the learned judges of the Second Division have done in this case seems to me to be eminently fair to both parties,—a good reason for preserving this issue, which is not the subject of any cross-appeal. They have in point of fact, my Lords, taken this statute which it is admitted covers the position of the defenders and put in the forefront of the issue, and before the faces of the jury, the actual and complete thing which must be affirmatively established. I think that nothing could more clearly direct the minds of the

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jury to the true point. I accordingly approve of the issue as it has been put. I think it a model form.

Interlocutors of the sheriff-substitute of Lanarkshire and the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, April 3, 1914.

Agents for appellants: *Martin & Co., for John Lindsay, Town Clerk, Glasgow, and Campbell & Smith, S.S.C., Edinburgh.*

Agents for respondent: *Herbert Z. Deane, for J. Ferguson Reekie, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1914 *April* 22.

THE MARQUESS OF LINLITHGOW AND OTHERS . . . . . } APPELLANTS;

AND

THE NORTH BRITISH RAILWAY COMPANY . . . . . } RESPONDENTS.

ET E CONTRA.

Compulsory Powers—Canal—Right of Support—Mines and Minerals—Notice to stop working—Union Canal Act, 1817 (57 *Geo.* 3, *c. lvi.*), *s.* 113.

In an action by a mineral owner and his tenants for compensation in respect of a seam of oil shale which they alleged they had been stopped from working by the proprietors of the canal, under the powers of a private Act of 1817, to ensure the safety of the canal:—

Held, upon the construction of the correspondence between the parties and of the private Act, that the defenders had not stopped the working of the seam.

Decision of the First Division of the Court of Session, 1912 S. C. 1327, reversed on this point but affirmed on other grounds.

APPEAL and cross-appeal from interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland. (1)

* *Present:* VISCOUNT HALDANE L.C., LORD KINNEAR, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARKER OF WADDINGTON.

(1) 1912 S. C. 1327.

The appellants, the Marquess of Linlithgow and his mineral tenants (hereinafter called the pursuers), brought an action against the respondents (hereinafter called the defenders) claiming in substance declarator (1.) that the Marquess was heritable proprietor of the minerals and in particular of the seams of shale and oil shale lying under or near a portion of the Union Canal belonging to the defenders; (2.) that it was necessary for the safety of the navigation of the canal to stop the working of the pursuers' seam of oil shale known as the Broxbourn main seam and that the pursuers had been stopped within the meaning of s. 113 of the Union Canal Act—a private Act passed in 1817—from working the said seam in the direction of the canal; (3.) that the pursuers were entitled to compensation for the value of the seam the working of which had been stopped.

Under the powers of the Union Canal Act of 1817, the original canal company (the defenders' predecessors in title), for the purposes of constructing the canal, acquired from the then Earl of Hopetoun (the predecessor in title of the Marquess) certain lands in the county of Linlithgow. The price was agreed upon and the company entered into possession in 1818, and the canal was completed and opened in 1822, but the statutory conveyance was not executed until 1862. The conveyance was in the form prescribed by the Act of 1817 and made no reference to mines and minerals, which by the operation of the Act were reserved to the landowner.

The two principal questions raised by the action were, first, whether shale and oil shale were at all material times minerals within the meaning of the Act of 1817; and, secondly, whether in fact the defenders had, within the meaning of s. 113 of the Act, stopped the working of the Broxbourn seam.

The Lord Ordinary (Lord Skerrington) held that the defenders had stopped the working of the Broxbourn seam, but that oil shale in 1818, which was the material date, was not a mineral within the meaning of the Act, and his interlocutor was adhered to by the First Division (the Lord President (Lord Dunedin) and Lord Mackenzie (Lord Johnston dissenting)).

The pursuers appealed against these decisions on the question whether oil shale was a mineral, and there was a cross-appeal

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by the defenders on the question whether they had stopped the pursuers from working.

In the view of the case taken by the House, no detailed report is called for.

1914. March 9, 10, 12, 23, 24, *Clyde, K.C.*, and the *Hon. W. Watson, K.C.* (both of the Scottish Bar), for the appellants.

Sir Robert Finlay, K.C., Macmillan, K.C. (the latter of the Scottish Bar), and *A. T. Lawrence*, for the respondents.

The House took time for consideration.

April 22. Their Lordships were of opinion, upon the construction of the correspondence between the parties and of s. 113 of the private Act of 1817, that the respondents had not stopped the appellants from working the Broxbourn seam, and they expressed no opinion upon the question whether oil shale was a mineral within the Act.

Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland affirmed except so far as they assoilzied the defenders from the first conclusion of the summons and so far as they referred to expenses: the first conclusion to stand dismissed as unnecessary, no judgment being pronounced in this House on the subject of whether the seams of shale or oil shale were embraced within the term "mines and minerals" as used in the Act 57 *Geo.* 3, *c. lvi. Cross-appeal dismissed. The appellants in the original appeal to pay the costs of the original and cross appeals.*

Agents for appellants: *Grahames, Currey & Spens, for Hope, Simson & Lennox, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for James Watson, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

DUBLIN CITY DISTILLERY (GREAT BRUNSWICK STREET, DUBLIN), LIMITED AND ANOTHER . . . . . APPELLANTS;

AND

DOHERTY . . . . . RESPONDENT.

H. L. (I.) 1914 *Feb.* 27; *July* 17.

Pledge—Constructive Delivery—Whisky stored in Distiller's Warehouse—Delivery Order—Company—Mortgage or Charge—Registration—Bill of Sale—Debentures—Trust Deed — Appeal — Competency—Winding-up in Ireland—Appeal by Liquidator without Leave of Court—Spirits Act, 1880 (43 & 44 *Vict. c.* 24), *ss.* 49, 51, 52, 61—*Bills of Sale* (*Ireland*) *Act*, 1879 (42 & 43 *Vict. c.* 50), *s.* 4—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14 —*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 151.

Sect. 151 of the Companies (Consolidation) Act, 1908, which enables a liquidator, in the case of a winding-up in Ireland, to bring or defend legal proceedings with the sanction of the Court, does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that no such sanction has been obtained.

The plaintiff advanced moneys to a distillery company on the security of manufactured whisky of the company stored in a warehouse provided by the company on the distillery premises in accordance with the Spirits Act, 1880. Neither the company nor the excise officer could obtain access to the warehouse without the assistance of the other, and the whisky could only be delivered out on presentation to the excise officer of a special form of warrant supplied by the Crown. On the occasion of each advance the company entered the name of the plaintiff in pencil in their stock-book opposite the particulars of the whisky intended to be pledged and delivered to the plaintiff (1.) an ordinary trade invoice and (2.) a document called a warrant, which described the particulars of the whisky and stated that it was deliverable to the plaintiff or his assigns and contained the words "free storage." No intimation of the transaction was given to the excise officer.

The plaintiff also advanced moneys to the company upon second debentures issued to him by the company in 1903, but forming part of an issue authorized by the company in 1895 and secured by a trust deed of that year.

Neither the warrants nor the debentures nor the trust deed were registered under s. 14 of the Companies Act, 1900.

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* *Present:* EARL OF HALSBURY, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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In an action by the plaintiff against the company in liquidation and the trustees for the second debenture holders to enforce his securities:—

Held (1.) by Lord Atkinson and Lord Sumner, and *semble* by Earl of Halsbury and Lord Parker of Waddington, that the plaintiff was not entitled to a valid pledge on the whisky comprised in the warrants; (2.) that, assuming that a pledge was created, it was, within s. 14, sub-s. 1 (*c*), of the Companies Act, 1900, a mortgage or charge created or evidenced by an instrument in writing which if executed by an individual would require registration as a bill of sale, and was consequently void as against the liquidator, for want of registration; (3.) that the plaintiff was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed.

Ex parte Close (1884) 14 Q. B. D. 386, *In re Cunningham & Co.* (1885) 28 Ch. D. 682, *Ex parte Hubbard* (1886) 17 Q. B. D. 690, and *Charlesworth* v. *Mills* [1892] A. C. 231 distinguished.

The authorities on constructive delivery reviewed by Lord Atkinson.

Decision of the Court of Appeal in Ireland [1912] 1 I. R. 349 reversed on points 1 and 2 and affirmed on point 3.

APPEAL from an order of the Court of Appeal in Ireland affirming a judgment of Barton J. (1)

The action was brought by the respondent against the trustees for the holders of second debentures in the appellant company and against the company in liquidation for (inter alia) declarations (1.) that he had become entitled to a good and valid pledge on certain whiskies which had been sold in the course of the liquidation of the company in priority to the second debenture holders; (2.) that he was entitled to a good and valid lien upon certain second debentures specified in the statement of claim for advances made by him to the company.

The company was incorporated in 1890 under the Companies Acts, 1862 to 1886, for the purpose of carrying on the business of whisky distillers at Dublin and elsewhere in Ireland, and by its memorandum of association it was empowered to borrow money on the security of all or any of its property. In September, 1890, the company raised the sum of 35,000*l.* by the issue of 350 debentures of 100*l.* each. In October, 1895, the company authorized the issue of a second series of debentures to the amount of 25,000*l.* These debentures created a floating charge on the

(1) [1912] 1 I. R. 349.

property of the company and they were further secured by a trust deed dated November 9, 1895, whereby certain freehold and leasehold property of the company was conveyed to trustees for the second debenture holders.

The second debentures stated that the registered holders of that issue for the time being were entitled pari passu to the benefit of the above-mentioned trust deed and they contained the following condition: "4. Nothing herein contained shall be taken to authorise the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created, with this exception, that the company may from time to time pledge to their bankers, or others, by delivery warrants, or other means, their manufactured whiskey, and the barrels and vessels containing the same, to secure an advance or advances, for the purposes of the company's business." Of this series the company issued debentures to the amount of 13,570*l.* prior to January 1, 1901, the date at which the Companies Act, 1900, came into operation. No further issue of this series was made until long after that date.

Between the months of November, 1904, and January, 1905, the respondent, who was a director of the company, had advanced to the company for the purposes of its business sums amounting in the aggregate to 2350*l.* These advances were made by the respondent's accepting the company's bills of exchange, which were then negotiated by the company, and which the respondent was ultimately obliged to take up. The mode in which these advances were secured was as follows: The company held a large stock of manufactured whisky in numbered casks bonded in the warehouse of the company on the distillery premises. The warehouse had two locks. The key of one lock was kept by the company and the key of the other by the excise officer, and neither party could obtain access to the warehouse without the assistance of the other. The particulars of the whisky were entered in the excise books kept on the company's premises in the name of the company as owner, and in the company's stock-book the number of each cask of whisky was then entered with a statement of its contents in gallons. On the occasion of each advance made by the respondent the company purported to pledge to

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him certain specific casks of whisky. The company first prepared a warrant in the following form :—

"No. 3441.

"Great Brunswick St.,
Dublin, 5th August, 1903.

"Warrant for 5 butts and 4 hhds. D. C. D. Pot Still Whiskey, bonded January, 1903, as per particulars underneath.

"Deliverable to Edward Doherty, Esq., Dublin, or assigns, by endorsement hereon, on payment of rent from and all other charges from date hereof.

"Free Storage.

(Then followed the particulars of the whisky.)

"The Dublin City Distillery
"(Great Brunswick St., Dublin),
Limited.
"Alfred J. W. Howes, Secretary.

"Entered Jno. Atkinson, Clerk."

This warrant was then handed to the respondent together with an invoice in the same form as if the whisky had been sold to him. The number of the warrant was then entered in red ink in the company's stock-book opposite the numbers and particulars of the casks, and opposite this entry of the warrant the name of the respondent and the date of the issue of the warrant were written in pencil. The particulars of the transaction were also entered in the company's register of mortgages. No intimation of the transaction was given to the excise officer. Notwithstanding the issue of these warrants the company sold the whisky comprised therein if it could find a purchaser for it. On the occasion of a sale the regular practice was to get up the warrant and cancel it, rub out the name of the respondent, which had been written in pencil in the stock-book, and enter the name of the purchaser in ink, and then substitute as a fresh security to the respondent fresh warrants and invoices of other whisky and make fresh entries in the stock-book in the same way as was done in the case of the original security. Occasionally the warrants were not delivered up for cancellation, but no whisky was ever sold without the consent of the respondent. When the whisky was being delivered to the

purchaser from the bonded warehouse a yellow form supplied by the Crown called "Warrant for the delivery of wet goods from a bonded warehouse" was filled up and signed on behalf of the company and handed to the excise officer, and this was the only form on which the excise officer would deliver goods. The warrants delivered to the respondent were not registered under s. 14, sub-s. 1 (*c*), of the Companies Act, 1900.

The respondent also advanced further sums to the company amounting in the aggregate to 350*l.* to enable it to introduce a yeast plant and for other purposes of its business, and as security for these advances the company issued to a trustee for the respondent twenty-seven second mortgage debentures. These debentures were issued at various dates in 1903 and 1904. They were not registered under s. 14 of the Companies Act, 1900, but the respondent claimed the benefit of the trust deed of November 9, 1895.

In 1905 an action of *Cox* v. *Dublin Distillery Co.* (1) was brought on behalf of the first debenture holders to enforce their security. The appellant Smyth was appointed receiver in that action and was also appointed liquidator in the winding up of the company. The assets of the company were more than sufficient to satisfy the claims of the first debenture holders and the respondent, but were not sufficient to pay all the second debenture holders in full.

In 1909 the respondent, by leave of the Court, commenced the present action, which was defended by the liquidator in the name of the company. The second debenture holders did not put in any defence.

The evidence given at the trial is fully dealt with in the judgment of Lord Atkinson.

Barton J. held (1.) that the respondent was entitled to a good and valid pledge on the whiskies contained in the warrants set forth in the second schedule to the judgment and that such pledge took priority over the second debentures; (2.) that he was entitled to a good and valid lien on the debentures in question so far as the same affected the freehold and leasehold premises comprised in the trust deed of November 9, 1895, for the amount

(1) [1906] 1 I. R. 446.

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of his advances; and this judgment was affirmed by the Court of Appeal (Barry L.C. and Holmes L.J., Cherry L.J. dissenting).

The respondent presented an incidental appeal submitting that the appeal was incompetent inasmuch as under s. 151 of the Companies (Consolidation) Act, 1908, leave to appeal to this House should have been obtained from the judge to whose Court the winding up of the company was assigned, and leave was refused.

1913. Nov. 27, 28; Dec. 1. *Younger, K.C.*, and *A. Alfred Dickie* (the latter of the Irish Bar), for the appellants.

Ronan, K.C. (of the Irish and also of the English Bar), and *Herbert Wilson, K.C.* (of the Irish Bar) (*Cave, K.C.*, and *J. Walker Doherty* (the latter of the Irish Bar) with them), for the respondent, took an objection as to the competency of the appeal. Under s. 151, sub-s. 1, of the Companies (Consolidation) Act, 1908, the liquidator, in the case of a winding-up in Ireland, has no right of appeal except with the sanction of the Court, and, the Court having refused its sanction, this appeal is incompetent. Under the Companies Act, 1862, s. 95, this rule applied to all liquidators, whether the winding-up was in England, Scotland, or Ireland, but the Companies (Winding up) Act, 1890, s. 12, allowed a liquidator in an English winding-up to do practically everything without the sanction of the Court. That Act, however, did not apply to Scotland or Ireland, and the law has not been altered by the Act of 1908. A liquidator is the creature of statute and his only right of appeal to this House is the statutory right provided by the Act of 1908.

Younger, K.C., and *A. Alfred Dickie*, contra. It is said that no leave has been obtained to prosecute this appeal and that the respondent is entitled to take that objection. But Lord Lindley in his book on Companies, 5th ed., p. 712, lays it down that the objection of want of leave cannot be taken by an adverse litigant. The effect of a liquidator's taking proceedings without leave is that he exposes himself to the risk of having to pay the costs personally. See *Lee* v. *Sangster* (1); *Piercy* v. *Roberts* (2);

(1) (1857) 2 C. B. (N.S.) 1.

(2) (1832) 1 My. & K. 4.

In re Silver Valley Mines (1); *In re London Metallurgical Co.* (2)

Ronan, K.C., replied.

EARL OF HALSBURY. We are all of opinion that the appeal must proceed.

The appeal was then heard upon the merits.

Younger, K.C., and *A. Alfred Dickie*, for the appellants. 1. The security comprised in the warrant and invoice, accompanied by the entry of the lender's name in pencil in the stock-book of the company and by the entry of the transaction in the register of mortgages, did not constitute a valid pledge. There can be no pledge without delivery actual or constructive, and neither the warrant nor the entry in the private books of the company operated a constructive delivery: *Anderson* v. *McCall* (3); *Mathison* v. *Alison*. (4) *Castle* v. *Sworder* (5), which is the strongest case in favour of the respondent, is distinguishable, first, because the decision was merely that there was some evidence of a change of possession, and, secondly, because the warehouse in that case included goods which did not belong to the seller. All the cases cited in the judgments of the Courts below are distinguishable. In *Marvin* v. *Wallis* (6) it was plain from the evidence that the character of the possession had changed, but here the evidence points to the contrary, for the company continued to deal with the goods in question in the ordinary course of business. *Martin* v. *Reid* (7) turned upon the construction of an instrument which stated on its face that possession of the goods had been transferred to the pawnee. *Reeves* v. *Capper* (8), which raised a question between rival pledgees of a chronometer, has no bearing on the point at issue In *Meyerstein* v. *Barber* (9) the question was at what period a bill of lading ceased to be operative for the purpose of effecting delivery. Willes J. there says that a mere contract to pledge is

(1) (1882) 21 Ch. D. 381.
(2) [1897] 2 Ch. 262.
(3) (1866) 4 Macph. 765.
(4) (1854) 17 D. 274, at pp. 281, 283.
(5) (1861) 6 H. & N. 828.
(6) (1856) 6 E. & B. 726.
(7) (1862) 11 C. B. (N.S.) 730.
(8) (1838) 5 Bing. N. C. 136.
(9) (1866) L. R. 2 C. P. 38.

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not sufficient to carry the legal property in the goods but amounts only to an authority to take possession, and that to complete the pledge there must be delivery, although constructive delivery is sufficient. That decision was affirmed first by the Exchequer Chamber (1) and afterwards by the House of Lords. (2) In *Ex parte Hubbard* (3) Lord Esher shews that the essential character of a pledge is the advancing of money on an actual deposit of goods as distinguished from an authority to take possession. Tried by that test this transaction was not a pledge, for the money was advanced on the warrant, which was a mere authority to take possession. Here there never was at any time any completed pledge at all. If the documents represent anything they represent a mortgage.

2. Assuming that this was a pledge it is void against the liquidator and the creditors of the company because the warrant by which the security was evidenced required registration under s. 14 of the Companies Act, 1900. It is "a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale." It is a licence to take possession of personal chattels as security for a debt and as such is included in the definition of a bill of sale in s. 4 of the Bills of Sale (Ireland) Act, 1879. It is said that this warrant comes within the words "warehouse keeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods" in the exception in that section and therefore does not require registration as a bill of sale. The words "in the ordinary course of business" govern all the documents mentioned in the section (see Benjamin on Sales, 5th ed., p. 857, upon a very similar provision in the definition clause (s. 1, sub-s. 4) of the Factors Act, 1889), and this exception was put in to protect ordinary recognized commercial transactions. It must therefore be shewn that this document was used in the ordinary course of business as proof of the possession or control of the goods and was intended to be so used. A warehouseman's certificate imports or connotes the

(1) (1867) L. R. 2 C. P. 661. (2) (1870) L. R. 4 H. L. 317.
(3) 17 Q. B. D. 690, at p. 697.

existence of three independent parties to the bargain, namely, the owner, the custodian, and the purchaser or mortgagee; and the certificate must be by the custodian. That is outside the mischief of the Bills of Sale Acts, the object of which was to prevent persons from getting false credit by apparent possession, but this document is within that mischief and is a bill of sale within the definition in s. 4 of the Act of 1879; and if it is within the definition it is immaterial that the transaction cannot be expressed in the form given in the schedule: *Ex parte Hubbard*. (1) Both that case and *Charlesworth* v. *Mills* (2) are distinguishable by the fact that there there had been an antecedent delivery and the document was merely evidence of what had taken place, whereas any shadow of title which the present respondent may have to this whisky is dependent on the warrant itself.

3. The respondent cannot claim any lien on the second debentures because they were not registered under the Act of 1900. Barton J. has held that, inasmuch as these debentures, though issued after the date of the coming into operation of the Act, are secured by a trust deed prior to that date, they are good to the extent of that security. But the trust deed was not an effective mortgage or charge in 1901 as regards debentures not then issued, and as to the debentures subsequently issued registration was necessary. The true view is that a debenture is created when it is issued: *In re Bircham* (3); *In re Harrogate Estates* (4); *In re I. C. Johnson & Co.* (5); *In re S. Abrahams & Sons*. (6) *In re Spiral Globe* (No. 2) (7) and *In re New London and Suburban Omnibus Co.* (8) were wrongly decided. [They also referred to *Cox* v. *Dublin City Distillery*. (9)]

Cave, K.C., and *Ronan, K.C.* (with them *Herbert Wilson, K.C.*, and *J. Walker Doherty*), for the respondent. 1. On the documents and on the evidence it is clear that an effective pledge was made. The respondent accepts the view that to make an effective pledge possession must be given to the pledgee. But possession may be actual or constructive; it may be possession

(1) 17 Q. B. D. 690, at p. 696.
(2) [1892] A. C. 231.
(3) [1895] 2 Ch. 786.
(4) [1903] 1 Ch. 498.
(5) [1902] 2 Ch. 101.
(6) [1902] 1 Ch. 695.
(7) [1902] 2 Ch. 209.
(8) [1908] 1 Ch. 621.
(9) [1906] 1 I. R. 446.

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by a bailee, and the bailee may be the pledgor: *Meyerstein* v. *Barber* (1); *Farina* v. *Home* (2); *Imperial Bank* v. *London and St. Katharine Docks Co.* (3); *Marvin* v. *Wallis* (4); *Langton* v. *Waring* (5); *Castle* v. *Sworder.* (6) *Anderson* v. *McCall* (7) and *Mathison* v. *Alison* (8) are inconsistent with the English authorities, although there is no difference between the laws of England and Scotland as regards pledges: *North Western Bank* v. *Poynter, Son, & Macdonalds.* (9) If the whisky were in the custody of a warehouseman the proper course would have been to give the warehouseman a delivery order to the respondent, but the company being their own warehousemen all that they could do was to give to the respondent some documents which shewed that they held the whisky for him. The delivery warrant is just the ordinary warehouseman's warrant by which he acknowledges that he holds the goods for the person mentioned in the warrant. The real question is whether on the evidence the company did agree to hold this whisky as warehousemen for the respondent. The character of the possession depends upon what was done to change the possession and what was the intention with which it was done: Blackburn on Contract of Sale, 3rd ed., pp. 362-3, 365. Here undoubtedly the intention of both parties was to make a valid pledge, and if they were honest men anxious to carry out their contract—and in mercantile transactions the Court proceeds on the basis that the parties are acting honestly: *Easton* v. *London Joint Stock Bank* (10); *Marsh* v. *Joseph* (11)—the acts which ensued—the giving of the warrant and invoice and the entry of the respondent's name in the stock-book—were all done to evidence the change in the character of the possession of these goods. This is eminently a case in which very slight evidence would be sufficient for that purpose. Not a single butt of whisky was sold without the consent of the warrant holder and the company always gave him other whisky

(1) L. R. 2 C. P. 38, at p. 52.
(2) (1846) 16 M. & W. 119, at p. 123.
(3) (1877) 5 Ch. D. 195, at p. 201.
(4) 6 E. & B. 726, at p. 735.
(5) (1865) 18 C. B. (N.S.) 315, at p. 330.
(6) 6 H. & N. 828, at p. 838.
(7) 4 Macph. 765.
(8) 17 D. 274.
(9) [1895] A. C. 56, at p. 70.
(10) (1886) 34 Ch. D. 95, at p. 115.
(11) [1897] 1 Ch. 213, at p. 246.

in the place of the whisky which they sold. The words "free storage" in the warrant are significant of its purpose. This warrant agrees exactly with the form given in Butterworth's Bankers' Advances on Mercantile Securities other than Bills of Exchange, p. 114, and is a common form commercial document. There is no fixed form of warrant. The essence of this case is that the company acknowledge that they hold this property for the respondent. Acknowledgment of agency may just as well be made by the vendor as by a third party. It is no objection that the company filled the double capacity of manufacturers and warehousemen. The delivery of the warrant operated as an estoppel against them: *Henderson & Co.* v. *Williams* (1); *Gosling* v. *Birnie* (2); Blackburn on Contract of Sale, 3rd ed., p. 205.

It is not true to say that the company dealt with these goods as if there were no pledge. This was not a floating or hovering charge, but a specific charge for which another specific charge was from time to time substituted. It is true that no transfer was entered in the excise books, but that is immaterial. The excise officer is merely a watchman and his only duty was to see that nothing left the warehouse without payment of duty: Spirits Act, 1880, ss. 49, 51, 52, 56, 62. No question of reputed ownership arises in this case, since that doctrine does not apply to the winding up of a company: *Gorringe* v. *Irwell India Rubber and Gutta Percha Works.* (3) Nor can any adverse inference be drawn from the entry of this transaction in the register of mortgages because the obligation to register under s. 43 of the Companies Act, 1862, extended to pledges as well as mortgages: *In re South Durham Iron Co.* (4)

2. Then it is said that the delivery warrant is void as against the liquidator for want of registration; but, first, this warrant is not a bill of sale within the definition in the Act of 1879. The warrant is not a licence to take possession but an acknowledgment by the owner that he holds possession on behalf of somebody else. The authorities shew that a pledge is not within the definition because a pledge assumes that possession has been taken, and the Act does not apply to a case where possession has

(1) [1895] 1 Q. B. 521.
(2) (1831) 7 Bing. 339.
(3) (1886) 34 Ch. D. 128.
(4) (1879) 11 Ch. D. 579, at p. 585.

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been given independently of the instrument: *Ex parte Close* (1); *Ex parte Hubbard* (2); *Charlesworth* v. *Mills.* (3) Secondly, it is within the express exception in the Bills of Sale Act. This is either a warehouseman's certificate or a warrant for the delivery of goods. The words "used in the ordinary course of business" apply only to "other documents," but, further, to borrow money on pledges of this nature is within the ordinary course of business. A warrant is an ordinary business document and is within the exception: *In re Hamilton Young & Co.* (4)

3. As regards the second debentures the charge created by the debentures themselves is void for want of registration, but the trust deed takes effect in respect of the whole series and inasmuch as the deed was executed before the passing of the Act of 1900 it does not require registration. The need for registration arises when the deed is executed and does not revive when fresh debentures of the series are issued. The respondent is therefore entitled to a lien on the debentures for the amount of his advances to the extent of the property comprised in the deed: *In re Spiral Globe* (No. 2) (5); *In re Harrogate Estates* (6); *In re New London and Suburban Omnibus Co.* (7); *Esberger & Son* v. *Capital and Counties Bank.* (8) In *In re Bircham* (9) it was held that a covering deed was not a completed mortgage when no debentures were issued under it; but if half the debentures had been issued the decision would have been the other way. In *In re S. Abrahams & Sons* (10) and *In re I. C. Johnson & Co.* (11) no question arose as to the registration of the covering deed.

Younger, K.C., in reply, referred to *Townley* v. *Crump* (12) as to the effect of a delivery order made by the vendor upon himself, and to *Tennant* v. *Howatson* (13) as to the meaning of "the ordinary course of business."

The House took time for consideration.

(1) 14 Q. B. D. 386.
(2) 17 Q. B. D. 690.
(3) [1892] A. C. 231.
(4) [1905] 2 K. B. 772.
(5) [1902] 2 Ch. 209.
(6) [1903] 1 Ch. 498.
(7) [1908] 1 Ch. 621.
(8) [1913] 2 Ch. 366.
(9) [1895] 2 Ch. 786.
(10) [1902] 1 Ch. 695.
(11) [1902] 2 Ch. 101.
(12) (1835) 4 Ad. & E. 58.
(13) (1888) 13 App. Cas. 489, at pp. 493, 494.

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1914. Feb. 27. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal in Ireland dated May 17, 1912, affirming the judgment of Barton J., dated June 8, 1911, pronounced in an action in which the respondent was plaintiff, and the appellant company and others were defendants.

Three questions arise for determination on this appeal :—

(1.) Whether your Lordships' House has jurisdiction to entertain the appeal.

(2.) Whether the respondent is entitled to a good and valid pledge on the whiskies contained in the warrants set forth in the second schedule annexed to the said judgment of Barton J. as against the appellants.

(3.) Whether the respondent is entitled to a good and valid lien on the debentures mentioned in the twenty-sixth paragraph of the statement of claim, in so far as the same affect the freehold and leasehold premises comprised in the trust deed dated November 9, 1895, for the amount of certain advances made by him to the appellant company.

Barton J. in his judgment, which has been affirmed, has, in effect, answered each of the two latter questions in the affirmative.

The facts of the case, so far as material, are as follows: The appellant company was incorporated under the Companies Acts on April 25, 1890, for the purpose of carrying on the business of distillers of whisky at Dublin, Banagher, and elsewhere in Ireland.

Its memorandum of association empowered it to borrow money, and to secure the repayment thereof by mortgages or debentures, charging all its property and rights.

In exercise of this power the company, in September, 1890, raised a sum of 35,000*l.* by the issue of 350 debentures of 100*l.* each, carrying interest at 5 per cent., and on the 20th of that month, in order to secure the same, executed, as is usual, a trust deed. With the validity of these debentures or the rights they confer this appeal is not conversant.

In the year 1895 the company, for the purpose of raising a further sum of 25,000*l.*, created and issued 250 debentures of 100*l.* each, carrying interest at 5 per cent. per annum, and

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charged with the payment thereof its undertaking and all its property, present and future, not comprised in the said indenture of September 20, 1890. These latter debentures are in the case styled the second debentures, and, like the first, purport to constitute a floating charge over all the assets of the company. The second debentures were further secured by an indenture dated November 9, 1895 (called in the case the second trust deed).

By it certain freehold and leasehold premises, the property of the company, were conveyed and assigned to Frederick Hans Kennedy and William Findlater, as trustees for the debenture-holders.

Amongst the conditions on which these second debentures were issued was one, No. 4, the terms of which it is necessary to consider. It ran as follows:—

No. 4. "Nothing herein contained shall be taken to authorise the creation of any mortgage or charge on the property for the time being of the company in priority to the charge hereby created, with this exception, that the company may from time to time pledge to their bankers, or others, by delivery warrants, or other means, their manufactured whiskey, and the barrels and vessels containing the same, to secure an advance or advances, for the purpose of the company's business."

On May 12, 1903, the company passed a resolution to issue 4000*l.* of these second debentures to the said Frederick Hans Kennedy as trustee for the respondent, Edward Doherty, and one Frederick Kennedy (two of the directors of the said company) as collateral security for advances made by them to the company. On May 27, 1903, in pursuance of this resolution, the company issued under their seal forty of these second debentures of 100*l.* each, bearing interest, as the others, at 5 per cent. per annum, to the said Frederick Hans Kennedy as such trustee as aforesaid.

On January 20, 1904, the company passed a resolution to issue twenty-seven additional second debentures to the said Frederick Hans Kennedy as trustee for those persons making advances to the company, otherwise unsecured, in connection with the purchase of some yeast plant and for carrying on the business of the company, and accordingly these debentures were duly signed and sealed.

On August 8, 1900, the Companies Act, 1900, was passed. By s. 14, sub-s. 1, of that statute it is enacted that every mortgage or charge created by a company after the commencement of the Act, and being either (*a*) a mortgage or charge for the purpose of securing any issue of debentures, or (*c*) a mortgage or charge created or evidenced by an instrument in writing which, if executed by an individual, would require registration as a bill of sale, or (*d*) a floating charge on the undertaking or property of the company, should, so far as any security on the company's property was thereby conferred, be void as against the liquidator and any creditor of the company unless filed with the registrar for registration in the manner required by the Act within twenty days after the date of its creation.

Neither the deed of November 9, 1895 (the second trust deed), nor the second debentures nor any of them were ever registered as required by this sub-section. Whether this was due to the company and its advisers being ignorant of the existence of this statute, or to inadvertence, or to a belief that registration was unnecessary to validate any of the securities they had created, does not clearly appear. No explanation was given of the omission to take this obvious precaution.

Between the months of November, 1904, and January, 1905, the respondent accepted several bills of exchange drawn upon him by the company, and by it negotiated. On the failure of the company to take up these bills at maturity, the respondent was obliged to do so, and on the latter date the company stood indebted to him on this account in a sum of 2350*l.* It also stood indebted to him in the additional sum of 350*l.* advanced by him to enable it to introduce the yeast plant already mentioned.

The company in the conduct of its business habitually stored the whole or the larger portion of the whisky it manufactured, when put into casks, in three separate stores upon its own premises in Dublin, the casks being, of course, numbered. These stores were created warehouses under the provisions of the 49th section of the Spirits Act of 1880. It is essential to consider some of the provisions of that statute in order to appreciate what follows from this creation, especially with regard to the change thereby effected in the extent and nature of the distiller's

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(in this case the company's) possession of and control over the spirits placed in these warehouses. These warehouses must, under the section, be situated, as they are in this case, in the distillery premises. They are stated to be established for the convenience of persons who desire to store in them whisky distilled in the distillery. No other kind of whisky can be stored in them. The distiller in such cases is bound to provide accommodation for the officer of the Inland Revenue put by the Revenue authorities in charge of them. In the presence of this officer, and only then, is the owner of the whisky, whoever he may be, permitted to view or examine it, or the cask containing it, or to shew the spirits for sale, and the distiller is permitted, on giving proper security but not otherwise, to transfer the whisky while it remains in the warehouse to another, once, but only once, all other transfers being prohibited (s. 62).

If the distiller should, therefore, sell or pledge any of the whisky stored in the warehouse, and should transfer in the warehouse books the goods so purchased or pledged from his own name into that of the purchaser or pledgee, neither of these latter could again transfer it while it remained there to another person. This disability accounts, I think, for the mode in which the respondent's name was dealt with in the company's books.

If the distiller should, in the absence of the Revenue officer, open any door or lock of such a warehouse, or remove any spirits therefrom, he is subjected to a heavy penalty. The Revenue authorities are, however, by the 52nd section, protected from the responsibility which one would think should naturally attach to them from the stringent control over the warehouse and its contents exercised by their officers. That section provides that the proprietor or occupier of the warehouse shall be alone responsible to the proprietor of any spirits warehoused therein for their safe custody, and further that no action shall be brought against the Commissioners of Inland Revenue or any of their officers for loss or damage occasioned to spirits while warehoused in such a warehouse, or on account of any wrong or improper delivery of spirits therefrom.

It is obvious, therefore, that in order that the Revenue officer should see that the provisions of this section are carried out, and

that due security is given by the distiller before he transfers any of the warehoused whisky to a purchaser or pledgee, it is essential that he should be informed that a transfer is about to be made, or has in fact been made, and should keep a record of some kind of the transaction.

The mode in which these provisions of the statute were in fact carried out in the appellants' warehouse was, according to the evidence, this: There were two locks on each door of each of the warehouses; the Revenue officer had the key of one lock, the company of the other. Books were kept in the office provided for these Revenue officers called the excise office. In these books the whisky placed in the warehouse was by one of the officers (there were two in charge) entered, in the first instance, in the name of the distillers, the appellant company.

The officers would not permit any whisky to be delivered out of the warehouse to the company, or to any one claiming from or through it, unless a document called "A warrant for the delivery of wet goods from a bonded warehouse" (see p. 116 of the Appendix), properly filled up, was first presented to them and the duty paid, but a transfer would be entered up by them in their own books if any writing duly authorized by the company was presented to them requesting that a transfer should be made to the person named therein. No particular form of document was prescribed or used for that purpose. The two officers in charge of the company's warehouses, Patrick Hurley and John Cronin, were examined at the hearing before Barton J. They proved that no request had ever been made to them to transfer in their books any whisky into the name of the respondent, and that they never had in fact done so. A document called a delivery warrant (printed at p. 114), upon which much in the case turns, was presented to each of them when in the witness chair.

Both proved that they would not deliver out any whisky on such a document. The first of them also stated that he had never seen such a document as this presented for the purpose of having a transfer made, the words "please transfer" or "transfer" not being in it, but that it was quite possible the officer in charge might accept it as a request to transfer, and so act upon it, and the second witness stated that he would, himself,

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so accept it, and so act upon it if it were presented to him. Both proved that once a transfer is entered up in their book the whisky will only be delivered out to the transferee.

The condition No. 4, already set forth, reserved to the company power to secure priority over the second debentures for pledges made to their bankers or others of their manufactured whisky "by delivery warrants or other means." The company determined to exercise this power in favour of the respondent, and from time to time delivered to him warrants of which that printed at p. 114 is a specimen. On each occasion the company delivered to him with the warrant an invoice bearing a number corresponding to the number on the warrant.

These two documents together with the two entries, one in the stock-book of the company, and the other in the register of mortgages, constitute the entire written evidence of the alleged pledge of this whisky having been given. No evidence was given as to what this stock-book was, in fact; whether a book kept by the company for the purpose of their business as distillers, or a book kept by them solely in their character of warehousemen, and no parol evidence whatever was given to shew that any negotiations had taken place, or any understanding had been arrived at, or any arrangement or agreement made between the respondent and the company as to whether the whisky was to be pledged to the respondent, or as to the terms upon which these invoices and warrants were delivered, or what it was intended to effect by their delivery, save what is contained in the respondent's answer to three questions put to him in the course of his examination at the trial. These questions run thus:—

"117. As regards the advances for taking up these bills of exchange, did the company give you any security?—They gave me the warrants.

"118. Are they set out in your schedule?—Yes.

"119. Did you keep them until you handed them over to the receiver?—Yes."

It was not shewn that the respondent knew anything about the entries in the books of the company. It is evident, I think, that he considered that the warrants were operative instruments,

and that by the mere delivery of them to him his debt was secured. He accordingly took no further step to perfect his security. The warrants were never indorsed by him to any one, as they naturally would be if the whisky pledged to him was sold to another. The invoice is quite a negative document; it cannot in itself have any operative effect.

The entry in the stock-book is peculiar in form. The respondent's name is written in pencil opposite the entries of the numbers of the several warrants delivered to him, but as the company continued to trade with the whisky so purported to be pledged, the names of the persons to whom it was ultimately delivered in pursuance of the sales made of it are entered in the last column on the page opposite these items, and the writing of the respondent's name in pencil is notwithstanding this allowed to remain. It is not erased or obliterated.

The reason why this expedient was adopted is obvious. If the transfer to the respondent had been duly completed, no other transfer of the whisky while it remained in bond could be made, so that however this stock-book may be regarded, whether as the book of the company as owners of the goods, or their book as warehousemen, the transaction with the respondent is deliberately kept incomplete. To render the sale and delivery of the whisky by the company legal and valid under the statute, it was necessary that the transfer of it to the respondent should be fictitious, and so it was, in my opinion, treated by the parties. This fact is clearly brought out in the evidence of the clerk of the company in his replies to questions 200 and 201. These questions and the answers to them run as follows:

"200. Did the company ever transfer to another person the whisky contained in these warrants without getting up the warrants?—We have frequently delivered whisky under special circumstances without getting up the warrants.

"201. Did you ever do it without the consent of the holder of the warrant?—No."

It was also deposed to that when the goods mentioned in a warrant were sold the warrant was cancelled, and a new warrant covering substituted whisky delivered to the respondent in its stead, but no evidence was given as to the nature of the special

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circumstances under which this was done, or how, and at what time, the respondent's consent to it was asked for or given.

Moreover, this consent would have been necessary even if a charge only on the whisky had been created. It is admitted that the respondent did not receive, and was not credited with, any portion of the proceeds of these sales.

It is not disputed by the appellants that the delivery of each of these warrants may have created an equitable charge in favour of the respondent upon the whisky mentioned in it, or that, if so, it would have been necessary, under the 43rd section of the Companies Act of 1862, for the company to have entered it in the register of mortgages. The respondent contends, on the authority of *In re South Durham Iron Co., Smith's Case* (1), that the respondent being a director of the company, it would still have been necessary for the company to have registered a pledge to him even if completed by constructive delivery of the whisky pledged. On the face of the register in this case the warrant is treated as the operative instrument creating the liability of the company, and it is equally consistent with its delivery being treated as per se creating a charge, and its delivery being but an effective and operative step in a transaction culminating in the creation of a pledge.

The respondent does not contend that the delivery of these warrants per se effected a pledge of the whisky mentioned in them; but that the delivery of them as a security, plus the entries in the company's books, shews that there was a constructive delivery to the respondent of the whisky, and, therefore, that it was validly pledged to him. The appellants, on the other hand, contend, first, that no constructive delivery of the whisky to the respondent is proved, that there was, therefore, no pledge of it effected, that at most a charge merely upon the whisky was created, and that this charge, not having been registered under the Companies Act of 1900, is void; and, second, that even if a pledge was given the warrants were the effective instruments by which it was created, and as such are void for want of registration under the Bills of Sale Act.

The question as to the competency of the appeal is easily

(1) 11 Ch. D. 579, at p. 592.

disposed of. On July 31, 1905, an order was made to wind up the appellant company, and the appellant, Samuel Smyth, was appointed liquidator. After the judgment of the Court of Appeal, now appealed from, was delivered, the liquidator applied to Barton J. for liberty to appeal therefrom to your Lordships' House. The application was refused by the learned judge, but he intimated that he would give every facility to the liquidator's taking the case on appeal to this House if the debenture-holders and creditors, in the interest of whom the liquidator appeared, would subscribe the necessary funds. This, I understand, they have done, and the usual security has been given by the liquidator. It is contended that under s. 151 of the Companies (Consolidation) Act, 1908, and s. 95 of the Companies Act, 1862, the liquidator had no power to present the petition of appeal in the case without the leave of Barton J., and that this leave had not been obtained; but it is clear, on the authority of *Lee* v. *Sangster* (1), *Piercy* v. *Roberts* (2), *In re Silver Valley Mines* (3), and *In re City and County Investment Co.* (4), that leave is not a necessary preliminary, and that the liquidator can always appeal at the peril, if unsuccessful, of being deprived of his costs. There is nothing, therefore, in the point.

As to the second question, it was not disputed that, according to the law of England, and indeed of Scotland, a contract to pledge a specific chattel, even though money be advanced on the faith of it, is not in itself sufficient to pass any special property in the chattel to the pledgee. Delivery is, in addition, absolutely necessary to complete the pledge; but of course it is enough if the delivery be constructive, or symbolical, as it is called, instead of actual.

The example of constructive delivery frequently given is the delivery of the key of the store or house in which the goods have been placed; but that is because, in the words of Lord Hardwicke, "it is the way of coming at the possession, or to make use of the thing": *Ward* v. *Turner*. (5) I doubt whether, owing to the dual control over this whisky exercised by the

(1) 2 C. B. (N.S.) 1.
(2) 1 My. & K. 4.
(3) 21 Ch. D. 381, at p. 387.
(4) (1879) 13 Ch. D. 475, at p. 483.
(5) (1751) 2 Ves. Sen. 431, at p. 443.

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distillers and the Revenue officer, it would not be necessary in the present case that both keys should be delivered.

Again, it is not disputed that if a vendor who has sold goods should, after the sale has been completed, agree with the vendee to retain the physical possession of the goods, but on such terms that the nature and character of his former possession is changed from that of owner to that of bailee for the purchaser, that transaction will amount to an acceptance and actual receipt of the goods within the 17th section of the Statute of Frauds, and necessarily to a good constructive delivery sufficient to create a pledge. The case of *Elmore* v. *Stone* (1) is an example of this. There the vendee, after the sale, asked the vendor, who was a horse dealer and livery stable keeper, to keep the horse for him at livery. The right to charge for the keep of the horse obviously shewed that the character of the vendor's possession had been changed, and that he thenceforward kept possession of the horse as the bailee for the purchaser.

In *Marvin* v. *Wallis* (2) the vendor, after the sale of a horse for more than 10*l.*, requested the vendee to lend him the horse, which the latter consented to do. The jury found that the vendee gave this consent "as owner." On that finding it was held that there had been an acceptance and receipt of the horse to satisfy the statute, Coleridge J. stating, however, that had the plaintiff retained possession of the horse in his character of unpaid vendor the result would have been different. In *Carter* v. *Toussaint* (3) the plaintiff, a farrier, sold by parol to the defendant for 30*l.* a horse which required to be fired. The plaintiff subsequently, at the request and in the presence of the purchaser, fired the horse. It was arranged between them that the horse should be kept by the plaintiff without charge, and it then was, by the defendant's directions, taken by the plaintiff's servant to Kempton Park and put to grass there. The horse was not entered at Kempton Park in the books of those who took it to graze in the name of the defendant. A Court composed of Abbott C.J., Bayley and Holroyd JJ., distinguished this case from *Elmore* v. *Stone* (1), and held that there had been

(1) (1809) 1 Taunt. 458. (2) 6 E. & B. 726.
(3) (1822) 5 B. & Al. 855.

no acceptance and actual receipt of the horse to satisfy the statute. It is said that the authority of this case, which resembles the present case more than either of the two preceding, has been questioned. I cannot find, however, that it has been overruled. It certainly was decided by three very able and distinguished judges, and was apparently approved of in *Marvin* v. *Wallis*. (1) The distinguishing feature in *Reeves* v. *Capper* (2), the chronometer case, as it was styled in argument, is that in that case there was, in fact, a delivery of the chronometer (the chattel to be pledged) by the pledgor to the clerk or agent of the pledgee, and that after a momentary possession by the latter there was by him a redelivery, duly authorized, of the chronometer to the original pledgor, the captain of the ship, on loan. The fact that the possession of the pledgee's agent, acting for his principals, was only momentary could make no difference. The case is wholly distinguishable from the present.

In the cases of *Hurry* v. *Mangles* (3) and *Whitehouse* v. *Frost* (4) the vendors of the goods sold were also warehouse keepers, but in the first of these the vendor received rent from the vendee for storing the goods, and, just as the liability for the livery of the horse in *Elmore* v. *Stone* (5) shewed that the character of the vendor's possession was changed, so here the payment of this rent shewed that the vendor held as bailee for the vendee, and that there was, therefore, a good acceptance and actual receipt of the goods to satisfy the statute. In the second case the vendee, who resold the goods, gave to the sub-vendee an order on the vendor to deliver them to the sub-vendee, and the vendor accepted that order. The goods sold were ten tons of oil, portion of forty tons stored in the vendor's tank, and it was held that from the moment of the acceptance of the vendee's order the possession of the vendor became changed, that he thenceforth held these ten tons as bailee for the sub-vendee, and that consequently this quantity of oil had been constructively delivered to the latter, so that the right of the seller to stop in transitu on the bankruptcy of the vendee was lost.

(1) 6 E. & B. 726.
(2) 5 Bing. N. C. 136.
(3) (1808) 1 Camp. 452.
(4) (1810) 12 East, 614.
(5) 1 Taunt. 458.

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Castle v. *Sworder* (1), decided in the year 1861, resembles the present case more closely, I think, than any of the foregoing. There the plaintiffs, who were wine and spirit merchants, kept a bonded warehouse in which they stored the goods of themselves and others, charging those others warehouse rent. The plaintiffs had one key of the door of this warehouse, the Customs House officer the other. The defendants bought from the plaintiffs, on credit, two puncheons of rum which were to remain in bond till wanted, the defendants to have six months' further credit. The plaintiffs sent to the defendants an invoice describing the puncheons by marks and numbers, with the words "Free six months" written thereon, which meant that the puncheons were to remain for that time in the warehouse without liability for rent. The plaintiffs entered in the rum book of their warehouse these puncheons of rum as sold to the defendants, and proved that after this entry they themselves had no power to get the goods out. The rum remained in the warehouse for two years, during which time the defendants on several occasions asked the plaintiffs to take the puncheons back or buy them from them. It was held by the Court of Exchequer Chamber, reversing the decision of the Court of Exchequer, that there was evidence to go to a jury that the character in which the plaintiffs held the goods was changed, and that if they held them as warehousemen for the defendants there was evidence of an acceptance and receipt of the goods by them to satisfy the 17th section of the Statute of Frauds.

Several of the facts which were relied upon in the judgments of Cockburn C.J. and Crompton J., who alone delivered judgments, distinguish that case from the present: (1.) the warehouse was a general warehouse; (2.) the request made by the defendants to the plaintiffs to buy back the goods; (3.) the entry in the rum and brandy book of the warehouse; and (4.) the proof by the plaintiffs that after this entry had been made they could not get the goods out of their warehouse. Nothing similar to these facts exists in the present case, and in addition one has to take into account the strong provisions of the Spirits Act of 1880. In *Townley* v. *Crump* (2) the defendants, merchants at Liverpool,

(1) 6 H. & N. 828. (2) 4 Ad. & E. 58.

having wine in their own bonded warehouse, sold some of it to Wright, who afterwards became a bankrupt. An invoice was delivered by the vendors at the time, stating that the goods were bought by Wright of the defendants. On the same day they gave to Wright a delivery order in the following words: "Mr. Benjamin Wright,—We hold to your order 39 pipes and 1 hhd. red wine, marked J.C. J.M. No. 41a 67—69a 80—pipes, No. 105 hhd., rent free, to 29 November next.—John Crump and Co." It was proved that as a matter of custom in Liverpool the goods specified in such an order would be considered to be the property of the person holding the order. Lord Denman, in delivering judgment, said "there was a total failure of proof that, where a vendor who is himself the warehouseman sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching; and I think it is not contended that there is any general usage which could devest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original vendor and vendee." It did not appear in this case that the defendants had made any transfer in their books, and it was contended that the words "rent free" in the delivery order shewed that the persons giving it considered themselves as being merely warehousemen for the bankrupt, yet it was held there was no constructive delivery of the wine: see *Harman* v. *Anderson*. (1)

The giving by the owner of goods of a delivery order to the warehouseman does not, unless some positive act be done under it, operate as a constructive delivery of the goods to which it relates: *McEwan* v. *Smith*. (2) And the delivery of a warrant such as those delivered to the respondent in the present case is, in the ordinary case, according to Parke B., no more than an acknowledgment by the warehouseman that the goods are deliverable to the person named therein or to any one he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned in some way to this person, and agreed to hold the goods for him; then, and not till then, does the warehouseman become a bailee for the latter; and then, and

(1) (1809) 2 Camp. 243. (2) (1849) 2 H. L. C. 309.

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not till then, is there a constructive delivery of the goods. The delivery and receipt of the warrant does not per se amount to a delivery and receipt of the goods: *Farina* v. *Home* (1); *Bentall* v. *Burn.* (2)

This statement of the law in *Farina* v. *Home* (1) is supported by many authorities, and, as I understand, was not questioned on behalf of the respondent in the present case.

In my opinion it is quite impossible to treat these delivery warrants as the agreement or memorandum in writing was treated in *Ex parte Hubbard* (3), namely, as a document accompanying a pawn or pledge made aliunde, and merely regulating the rights of the pledgee with regard to goods the possession of which was already delivered to him. In that case the bankrupt borrowed a certain sum of money, and then and there deposited with the lender two tricycles as security for the repayment of the loan. The memorandum, which it was contended was a bill of sale, was then drawn up. In the present case there is not a particle of evidence, independent of the warrant and the entries in the books, to shew that a single cask of the whisky was ever pledged to the respondent. On the contrary, in the passage of his evidence already referred to he distinctly states that it was the delivery of these warrants which constituted his security.

The same remark applies to the case of *Charlesworth* v. *Mills.* (4) There the man who took possession of the goods seized on behalf of the sheriff continued in possession on behalf of Charlesworth after the amount of the execution had been paid. And Lord Watson, at p. 240 of the report, states in one sentence the ratio decidendi thus: "It" (the letter) "contains a mandate to hold and sell the goods; but it was not intended to operate, and did not, in point of fact, come into operation, until possession had been actually transferred from the sheriff to the appellant." For myself, I may say that I have been unable to discover in the present case any evidence of a parol contract to give a pledge, or of any pledge having been completed in pursuance of that contract.

Turning to the warrant itself, it states that the goods are deliverable to the respondent or his assigns, which can only

(1) 16 M. & W. 119.
(2) (1824) 3 B. & C. 423.
(3) 17 Q. B. D. 690.
(4) [1892] A. C. 231.

mean, I think, at most, that he or his assigns were entitled to obtain delivery of them if he or they should demand it. That statement would, of course, be perfectly true if he were merely the purchaser of the goods and had paid for them, or was entitled to obtain delivery of them in that character or by that right. No indication is given whether the company executed the warrants in the character of warehousemen or in that of owners or vendors or pledgors. No rent is to be paid. The words "Free storage" indicate, I think, nothing more than this, that the respondent is not to pay anything for the storage of the goods by the company till they are delivered, while the indorsements on the back of the specimen warrant shew that portions of the goods mentioned in it were in fact delivered out on November 4, 1903, and again twelve months afterwards, and that the remainder were sold to J. Clarke & Co. on November 15, 1905. Presumably the document could not have been cancelled till this latter date, when the last portion of the whisky it covered was disposed of. The respondent was not asked a single question in reference to the company's dealing in this way with the property he contends was pledged to him. The only evidence touching it is that already referred to given by the clerk. This evidence is, in my view, extremely vague and unsatisfactory. It leaves it quite uncertain whether the company did not, in their dealings with this whisky in the first instance, practically ignore the alleged pledge, and treat the whisky as their own. I am, therefore, of opinion that the evidence, documentary and oral, such as it is, does not establish that there was a constructive delivery to the respondent of the whiskey with which this case is conversant.

Even if this were not so, the question would remain whether these delivery warrants are bills of sale within the meaning of the Bills of Sale (Ireland) Act, 1879, and the amending Act of the year 1883, requiring registration to give them validity. These statutes are practically identical with the corresponding English statutes of the years 1878 and 1882. The English authorities are, therefore, directly applicable.

The warrants in this case are unlike delivery orders addressed to a bailee directing him to give to the pledgee possession of the goods intended to be pledged. They are not so explicit as the

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document held to be a bill of sale in *Ex parte Parsons*. (1) That document ran thus: "I hereby authorize and empower you to take immediate possession of all my goods, chattels, etc., etc." In *Ex parte Close* (2), the bank on November 10, 1882, received an advice note from the railway company somewhat similar to the warrants in this case, to the effect that certain bales of leather had arrived at their station and were held by them to the order of the bank. On November 13 the bank received from the railway a similar advice note that they had received fourteen additional bales. The bank on the same day advanced to the trader 500*l.*, and a minute of the transaction was entered in the bank books and was signed by the trader. The contest was as to whether this minute, not the advice note sent by the railway company, was a bill of sale, and it was held not to be so. The advice note was apparently held to be an attornment by the railway company to the bank. These warrants also differ from the documents contended to be bills of sale in *Ex parte Hubbard* (3) and in *Charlesworth* v. *Mills* (4) which merely regulated the rights of pledgees under pledges made aliunde. *In re Cunningham & Co.* (5) is distinguishable from the present case owing to the fact that there immediate possession of the goods was delivered to the pledgee contemporaneously with the execution of the document which it was contended was a bill of sale.

I think these warrants come within the words of s. 14, sub-s. 1 (*c*), of the Companies Act of 1900. I further think that if they are bills of sale at all within the meaning of the 4th section of the Irish Bills of Sale Act of 1879 they are not shewn to be included in the exceptions mentioned in that section, since no proof was given of their use in the ordinary course of business as proof of the possession or control of goods. I own I entertain some doubt as to whether they come within the words of this section at all, either as assurances of personal chattels, or as licences to take possession of goods, or yet as agreements by which a right in equity to personal chattels or a charge thereon is conferred; but my doubt is not sufficiently serious to induce

(1) (1886) 16 Q. B. D. 532.
(2) 14 Q. B. D. 386.
(3) 17 Q. B. D. 690.
(4) [1892] A. C. 231.
(5) 28 Ch. D. 682.

me to differ from the conclusions on this point at which my noble and learned friends Lord Halsbury, Lord Parker, and Lord Sumner have arrived. I therefore concur with them.

As to the third question, I concur with Barton J. and the Court of Appeal, that the second debentures are void for want of registration, so far as they purport to create a floating charge on the general assets of the company, but that the holders of them are in the position of cestuis que trust under the trust deed of November 9, 1895, and that the respondent is entitled to a good and valid lien on the debentures mentioned in the twenty-sixth paragraph of the statement of claim, so far as they affect the freehold and leasehold properties comprised in that deed for the amount of the advances. In other words, I think that Barton J.'s answer to the third question was correct. I am, therefore, of opinion that the appeal should be allowed so far as it concerns the second question, and that the order of Barton J. should be modified accordingly.

Lord Parker of Waddington. My Lords, I am asked to state that my noble and learned friend Lord Halsbury agrees with the judgment I am about to deliver.

My Lords, the respondent in this appeal claims, and has been held in the Courts below to be entitled to, certain spirits which at the date of the winding-up were stored in a warehouse belonging to the appellant company. It appears that the company, being indebted to him in various sums in respect of bills, accepted for its accommodation, and retired by him as they matured, gave him from time to time, by way of security for such indebtedness, certain invoices in a form specified on p. 113, and certain warrants in a form specified on p. 114, of the Appendix, and in respect of each such warrant made an entry in its books shewing that it had been issued to him. Every invoice and warrant referred specifically to spirits the property of the company and stored in the company's warehouse. It may, I think, be taken that the parties intended that, by virtue of these documents, the respondent should obtain, for the moneys due to him from the company, a security on the spirits specified in the invoices and warrants. There was, however, no antecedent agreement as to the nature

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of the security intended to be created, and the effect of what was done must in this respect be gathered from the documents themselves.

The respondent contends that these documents operate by way of pledge. It is quite certain that at common law a pledge cannot be created unless possession of the goods the subject of the pledge be delivered to the pledgee. When the goods in question are in the actual possession of the pledger, possession of them is, as a rule, given to the pledgee by actual delivery of the goods themselves. There are, however, cases in which possession may pass to the pledgee without actual delivery, for example, whenever there is some agreement between the parties the effect of which is to change the possession of the pledger from a possession on his own account as owner into a possession as bailee for the pledgee: see *Meyerstein* v. *Barber*. (1) Such an agreement operates as a delivery of the goods to the pledgee and a redelivery of the goods by the pledgee to the pledger as bailee for the purposes mentioned in the agreement. A mere book entry cannot, however, have this effect. When the goods are not in the actual possession of the pledger, but of a third party as bailee for him, possession is usually given by a direction of the pledger to the third party requiring him to deliver them to, or hold them on account of, the pledgee, followed either by actual delivery to the pledgee or by some acknowledgment on the part of the third party that he holds the goods for the pledgee. The form in which such direction or acknowledgment is given is immaterial. Where the third party is a warehouseman the direction usually takes the form of a delivery order and the acknowledgment of a warrant for delivery of the goods or an entry in the warehouse books of the name of the pledgee as the person for whom the goods are held. The acknowledgment, whatever its form, does not change the nature of the warehouseman's possession. He still holds as bailee, but for the pledgee instead of the pledger. He has simply attorned to the pledgee.

I will ask your Lordships to assume for the present that the spirits to which each invoice and warrant related were in the

(1) L. R. 2 C. P. 38.

actual possession of the company when such invoice and warrant were handed to the respondent by way of security. It is common ground that there was no actual delivery of the spirits to the respondent. If the spirits were delivered at all so as to constitute a valid pledge at common law, it can only have been because each invoice and warrant, taken alone or in connection with the corresponding entry in the company's books, changed the nature of the possession of the company from a possession as owner into a possession as bailee for the respondent. For this purpose it appears to me that the invoice, which merely identifies the goods, and the entry in the books, which only records the name of the person to whom the invoice and warrant were issued, may be disregarded. The real question is as to the effect of the warrant. This warrant is somewhat ambiguous in its terms. It may mean simply that the company undertakes to deliver the goods referred to therein when required by the respondent or his assigns by indorsement. It may mean that the company acknowledges that it holds the goods referred to as bailee for the respondent or his assigns by indorsement. On the whole, having regard to the circumstances under which it was executed, I incline to the opinion that it was intended to have the latter meaning, and this fits in with the provision as to free storage. If this be the true meaning of the warrant it is sufficient to change the nature of the company's possession, operating as an actual delivery of the goods to the respondent, and a redelivery of the same goods by him to the company to hold as bailee for him. Under these circumstances, on the hypothesis that the company was in actual possession, the respondent obtained a good pledge at common law.

This, however, does not dispose of the matter, for your Lordships have still to consider the effect of s. 14 of the Companies Act, 1900, which provides (sub-s. 1) that every mortgage or charge created by a company, and being (*c*) a mortgage or charge created or evidenced by an instrument in writing which, if executed by an individual, would require registration as a bill of sale, shall, unless registered as therein provided, be void against the liquidator.

Several questions arise on this provision, which is not very

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happily worded. In the first place, your Lordships have to decide whether the expression "mortgage or charge" as there used includes a common law pledge. In my opinion it does. The object of the section is to give notice to all who deal with a company of certain matters which vitally affect the company's credit. For this purpose no distinction can be drawn between a pledge at common law and a mortgage or charge. Moreover, the same words in s. 43 of the Act of 1862, which was passed with the same object, and was replaced by s. 14 of the Act of 1900, were held to include common law pledges: see *In re South Durham Iron Co.* (1) In the next place, assuming the warrants to have been bills of sale, would they, if executed by an individual, have required registration as bills of sale? If bills of sale, they would, if executed by an individual, have been totally void under the Irish Bills of Sale Act of 1883 for at least three reasons: they are not in the statutory form required for all bills of sale by way of security for money; they are not attested; and they do not state the consideration for which they were given. They would be no more valid if registered than if unregistered. They could not, therefore, require registration in any ordinary sense of the word. At the same time it is hardly conceivable that s. 14, sub-s. 1 (*c*), was intended to refer only to instruments which fulfilled these statutory requirements. I think, therefore, that the provision therein contained must be construed as applying to all instruments which, if executed by an individual, would for their validity require registration, apart from any other ground upon which they would be invalid under the Irish Bills of Sale Act of 1883. If this be so the warrants, if bills of sale at all, would be within s. 14, sub-s. 1 (*c*), of the Companies Act, 1900.

It remains to be considered whether the warrants in question are bills of sale at all. On the principle laid down in *Ex parte Hubbard* (2) and *Charlesworth* v. *Mills* (3) it was argued that they were not. I do not, however, think that those principles have any application to the present case. They apply only when the pledge at common law is complete without any assistance

(1) 11 Ch. D. 579. (2) 17 Q. B. D. 690.
(3) [1892] A. C. 231.

from the document said to constitute a bill of sale. In the present case, however, it would, I think, be hopeless to contend that, apart from the warrants, there was a good pledge at common law. The question, therefore, whether the warrants are or are not bills of sale depends entirely on the definition of a bill of sale contained in s. 4 of the Irish Bills of Sale Act of 1879. It appears to me that a document, the effect of which is to complete a common law pledge by passing to the pledgee the possession of the goods the subject of the pledge, is an assurance of personal chattels within the definition, even if it be not also a licence to take possession of the goods. In the case of *Ex parte Close* (1) there had been a delivery order by the owner of goods in the hands of a common carrier, directing transfer to the order of a bank, which was advancing money on the security of the goods, followed by an advice note from the carrier to the bank stating that the goods were held to the order of the bank. The delivery was thus completed, but there was also a memorandum signed by the owner of the goods, and specifying the terms of the bargain between the parties. It was contended that the delivery order and memorandum were bills of sale, and required registration. Clearly, however, the delivery order was within the express exception contained in s. 4 of the English Act of 1878, and the pledge being complete without the memorandum, the principle afterwards laid down in *Ex parte Hubbard* (2) applied. Cave J. says: "I am satisfied on the construction of the Bills of Sale Acts that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or, in fact, any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee." It seems to me that Cave J. was referring to cases in which the pledge had been completed by delivery independently of the document which was said to be a bill of sale. I do not think he meant to say that a document which itself passed the possession to the pledgee, and was not within the exception, was not a bill of sale. *In re Cunningham & Co.* (3) was a

(1) 14 Q. B. D. 386. (2) 17 Q. B. D. 690.
(3) 28 Ch. D. 682.

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precisely similar case. The possession was given by means of the indorsement of a wharfinger's warrant, followed by an attornment of the wharfinger to the pledgee. It was held that a memorandum of the terms of the transaction did not require registration, though executed between the date of the delivery order and the date of the attornment. In *Ex parte Parsons* (1) both these decisions were criticized on an erroneous view of the ratio decidendi. *Ex parte Close* (2) was, however, approved in *Ex parte Hubbard*. (3) But in his judgment in the latter case Bowen L.J. made use of expressions capable of indicating that, in his opinion, Cave J. had held, and was right in holding, that no document which passed to the pledgee the possession of the goods the subject of the pledge could ever be a bill of sale. " I cannot think that Bowen L.J. really meant this, nor can I find any other authority for such a proposition. In my opinion, therefore, the warrants in question were bills of sale unless they can be brought within the exception. I am of opinion that they cannot be brought within the exception. They are, it is true, substantially in the same form as a warehouseman's delivery warrant, but their effect is quite different. A warehouseman's delivery warrant, given under circumstances such as exist in the present case, would operate only as an attornment to the pledgee, a thing of every-day occurrence. But the warrants in question operate to change the nature of the pledger's possession from a possession as owner to a possession as bailee for the pledgee, a thing comparatively rare. I am of opinion that the warrants for delivery referred to in the exception are warrants which operate in the ordinary manner and not warrants which, though in the same form, have a totally different effect. Otherwise any owner of personal chattels could evade the Bills of Sale Acts altogether by executing as to the furniture in his house, the hay in his barn, or the wine in his cellar, a document in the form adopted in this case. It was suggested that the warrants in this case, even if not warrants for delivery, were, nevertheless, within the exception as " other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising, or

(1) 16 Q. B. D. 532. (2) 14 Q. B. D. 386.
(3) 17 Q. B. D. 690.

purporting to authorise either by indorsement or by delivery, the possessor of such document to transfer or receive the goods thereby represented." But in my opinion, in order to bring the warrants in question within these words it must be proved that they are documents used in the ordinary course of business, and this was certainly not proved.

I am of opinion, therefore, that even if the respondent has a valid common law pledge, it is, under s. 14 of the Companies Act, 1900, void as against the liquidator, for want of registration under the Act of the warrants in question.

I am, however, inclined to think, though perhaps it is unnecessary to decide the point, that the respondent never had any pledge at common law, for quite another reason. The warehouse in which the goods were stored was a distiller's warehouse kept by the company, and approved by the Inland Revenue under the Spirits Act, 1880. If that Act be examined, it seems to me to contemplate that neither a warehouse so kept and approved nor any spirits stored therein will remain in the distiller's possession or at any rate in his exclusive possession. The distiller has, under the 51st section, to provide accommodation at the warehouse for the Inland Revenue officer in charge thereof, but under the 52nd section he is to be alone responsible to the proprietors of any spirits warehoused there for the safe custody of such spirits, and no action is to lie against the Inland Revenue or its officers for loss or damage to spirits whilst in a distiller's warehouse, or on account of wrong delivery of spirits therefrom. Under the 61st section the proprietor of the spirits in the warehouse (who must be either the distiller or a transferee from the distiller) may have access to them for certain purposes, but only in the presence of the officer in charge. This makes it necessary for the officer in charge to recognize the title of transferees from the distiller, but subject to the proviso contained in the 62nd section, which enables the distiller to transfer to a purchaser, but so that no further transfer be made while the goods remain in the same warehouse. The Act, therefore, seems to contemplate that the officer in charge of a distiller's warehouse will, for some purposes at any rate, be in the position of a warehouseman holding the warehoused spirits

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as bailee for the distiller or his assignees, but not bound to recognize the title of any assign who does not claim by direct transfer from the distiller.

In the case of the warehouse on the distillery premises of the defendant company at the date of the winding-up, the practice appears to have been as follows : The warehouse was secured by means of two locks. The company had the key of one, and the officer in charge had the key of the other. Neither could obtain access to the warehouse without the assistance of the other. The officer in charge kept a book containing particulars of the spirits in the warehouse. If so requested by the company as to any parcel, he transferred it in his book to the name of the company's assignee, and after so doing recognized the assignee as sole proprietor of the parcel so transferred, and did not allow the parcel to be dealt with otherwise than by the order of such assignee. Until transfer he recognized no title but that of the company. Under these circumstances it is, I think, difficult to hold that the possession of any spirits after being placed in the warehouse remained solely in the company. It would rather appear that such possession was thereafter at most the joint possession of the company and the officer in charge, the spirits being held on account of the company or of its transferee in the books of the officer in charge. I am of opinion that a delivery warrant signed by one of two joint warehousemen, even if it be expressed to be so signed on behalf of both, can only bind the other if the one who signs can be treated as the agent of the other duly authorized in that behalf. Here the circumstances are such as to negate any such agency. It would seem to follow that the respondent, having neglected to complete his title as pledgee by obtaining an attornment from the officer in charge of the warehouse either by means of a proper entry in such officer's book or otherwise, did not obtain possession of the spirits referred to in the invoices and warrants, and therefore obtained no valid pledge, but at most became entitled to an equitable charge, which, having regard to what I have said above, would be certainly void against the liquidator of the company for want of registration under s. 14 of the Companies Act, 1900.

My Lords, there is yet another point which arises on this

appeal. It appears that on November 9, 1895, the company executed a trust deed for the purpose of securing an issue of second debentures. By this deed certain freeholds and leaseholds belonging to the company were conveyed or demised to the trustees therein named, upon trust in certain events therein specified to sell the same and hold the proceeds subject to the payment of costs in trust for the holders of such second debentures as the company might thereafter issue. Clearly neither the trust deed itself nor any second debentures issued prior to the passing of the Companies Act, 1900, required registration under that Act. But the company, after the passing of that Act, issued certain second debentures to the respondent, these debentures containing (1.) a clause entitling him to the benefit of the trust deed, and (2.) a floating charge over all the assets of the company. So far as this floating charge is concerned, it is admitted to be void as against the liquidator of the company for want of registration under the 14th section of the Act, but the question arises whether notwithstanding such want of registration the respondent is not entitled to the benefit of the trust deed pari passu with the other holders of second debentures. I have come to the conclusion that he is so entitled. As a holder of second debentures he is a cestui que trust under the trust deed, which itself is good as against the liquidator though unregistered. His debentures are not entirely avoided by the 14th section, even against the liquidator, but avoided only so far as any security on the company's property or undertaking is thereby conferred. In my opinion the security to which the respondent claims title is, so far as the property comprised in the trust deed is concerned, conferred by such deed and not by the debentures. Even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder. The case is analogous to a charge for the portions of younger children contained in a settlement of real estate. The portions are conferred by the settlement, and not by the birth of the cestui que trust. In my opinion, on this point the appeal fails.

I need only add, with reference to the preliminary point as to the competency of this appeal, that in my opinion s. 151 of the Companies (Consolidation) Act, 1908, which enables a liquidator in

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the case of a winding-up in Ireland to bring or defend legal proceedings with the sanction of the Court, was not intended to confer, and does not confer, on third parties any right to object to proceedings brought by a liquidator in the name of the company, on the ground that no such sanction has been obtained. In this respect I agree with the opinion expressed in Lindley on Companies, 5th ed., pp. 712, 713.

LORD SUMNER. My Lords, the first question is this: Did Mr. Doherty obtain a legal pledge of the whisky in question or only some other security? The evidence in the case was very meagre; much was taken for granted. Both by Barton J. and by the majority of the Court of Appeal it was found as a fact that, before any warrant was delivered to Mr. Doherty, there existed a parol agreement between him and the distillery company "to give him the security which he required, namely, a valid pledge by delivery warrants or other means." With all deference I can see no evidence of this. Mr. Doherty, though a witness, said nothing about it, nor did anybody else. No doubt the question of security had been raised; possibly something had been settled. I do not suppose the warrants and invoices fell on Mr. Doherty as it were from the clouds, but we are left altogether in the dark about this agreement. We can only guess what it was or when it was made. Condition 4, indorsed on the second debentures, is supposed to help us. It is said that this condition, truly construed, permits priority over the second debentures only to legal pledges, pledges which are to be effected somehow by the issue of warrants; that the company and Mr. Doherty must be taken so to have understood the condition and to have intended to give effect to it when these documents were delivered; and that the law will therefore give to these documents the meaning and effect which the parties intended them to have. Intention, however, is a question of fact and depends on proof, and where is the proof of all this? Mr. Doherty may or may not have read the debentures, which he joined in issuing as a director and took as a creditor. If he read them he may have understood them in this sense or in that. Even the construction is not certain, but is open to debate. Such evidence as there is on this point is satisfied by inferring that

Mr. Doherty was to be secured, and that it was believed that his security would take priority over the second debentures, but if the language used and the acts done fail to establish a pledge, I cannot see that your Lordships can be warranted in holding that there was a pledge because, as things are seen to stand now, the parties might well have agreed to create one.

My Lords, I think that in truth Mr. Doherty's claim rests on the delivery of the warrants themselves, coupled with the invoices and book entries and the other circumstances of the case; indeed, he so pleaded it in paragraph 13 of his statement of claim. The material circumstances I take to be these: (1.) that, in spite of the use of an invoice, the transaction was really one of loan and not of sale; (2.) that Mr. Doherty's name, though entered in a particular manner by the distillery company in its own stock-book, was never entered at all in the books of the excise officers; (3.) that the store in which the whisky was kept, being a store to which the Spirits Act, 1880, applied, could not be opened without the concurrence of the excise officer, who had keys of it; (4.) that the whisky, in respect of which Mr. Doherty held warrants, was never delivered to purchasers without his consent first obtained, nor generally without redelivery of the warrants held by him, in which case he received new warrants for other whisky of equivalent quantity but not necessarily of equal value.

I propose to assume, without any decision upon the actual effect of the Spirits Act, that the excise officer is not in possession of the whisky in the statutory distiller's warehouse, either separately or jointly with the distillery company; that, in the phrase of Cherry L.J., he is not a warehouseman but a watchman. I will assume too, as the evidence suggests, that the separate "yellow form," on which alone, duly filled up, the excise officer would permit the removal of whisky, was one which the distillery company would have been bound to fill up and would have filled up for Mr. Doherty, if he had otherwise obtained constructive delivery of possession and had demanded to have the whisky actually put into his hands. In other words I will take it that, if the delivery of the warrant was a constructive delivery of possession of the whisky at all, it would be so none

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the less that the excise officer would not let the goods pass except on presentation of the yellow form, duly filled in by the distillery company or with its assent.

Apart from the delivery of the warrants themselves, to what do these surrounding circumstances, proved or assumed, amount? In my opinion little or nothing. That the transaction was a loan on security does not advance matters; the question is on what security? That Mr. Doherty's name was entered (most informally be it said) in the distillery company's own books is relevant only to the company's intention, for the entry was not shewn to have been communicated to him or to strangers and might have been deleted at any time. Whether what was intended was a valid pledge or some other security we cannot tell, not even with condition 4 to help us. At most the intention was to effect a pledge by means of the warrant, if by means of that warrant it could be done. Without going so far as Cherry L.J. did, I think it is clear that no one was to sell the whisky except the distillery company, and that the purpose of the alleged pledge would have been almost defeated had it been otherwise. The security in question was collateral security for Mr. Doherty's liability as indorser of the company's finance bills, and how would sales and deliveries by him of whisky lying in the store, in which the company was maturing its own product before sale, be consistent with the maintenance of its credit? In practice nothing of the kind was attempted; before selling the whisky and giving Mr. Doherty substituted warrants the company got his consent, but there is no suggestion that his consent was ever in doubt. In my judgment the surrounding circumstances, so far as they go, point rather to a promise to give a floating charge than to a legal pledge.

What effect, then, has the warrant itself? The document is in a form which is used by warehouse keepers, and I do not doubt that, in the hands of or issued by such persons, it would have been a valid warehouseman's warrant. It would have been a statement that the warehouse keeper in fact held the goods named, which he would have been estopped from denying. It would have imported a promise, made to the party to whom it was issued, to deliver, as between bailee and bailor, in accordance with its terms and on

payment of the charges due, if any. On presentation of it by an indorsee and on attornment to him by the warehouse keeper, a like estoppel and a like promise would have arisen in his favour. The company's position, however, is different. It is not a warehouse keeper. It carries on no such business. The warehouse, so called, was its own, used for its own whisky only and not for the goods of others. There is no magic in the word "warehouse"; "cellar," "store," or "vault" would have done as well. The company issued these warrants in great numbers, as the serial numbers shew, but there is no evidence that it did so for any purpose except to create a security. The language of the document is ambiguous. As it contains no verb, we lack the chief indication to shew whether it is a statement de præsenti or de futuro, whether it promises that these "deliverable" goods will be delivered, or avers that, being "deliverable," they have been already delivered constructively and are at Mr Doherty's disposal in specie. Warrants it is said (Q. 37) are issued when a purchaser asks for them, but there is no evidence that he ever does so, and the evidence of the excise officer (Q. 165) is quite inconsistent with anything of the kind. There was no evidence of any usage of the distillery business to employ warrants for such a purpose as this, or to deal with a distiller's warrant, relating to whisky of his own manufacture lying in his own store, as warehousemen's warrants are dealt with in commerce generally. Nor was this proved in the earlier case of *Cox* v. *Dublin City Distillery*. (1) As in that case so in the present one, both Courts below said, and truly, that warrants are very familiar documents, but they spoke of warrants issued by persons who are in fact warehouse keepers. They neither assert nor imply familiarity with the use of warrants in such transactions as occurred between the company and Mr. Doherty. I daresay similar transactions occur. Its stock of maturing whisky in bond is an asset which a distillery company would naturally use as a security for loans, but that is not the point. The question is whether there is anything here, outside the warrant itself, to establish a valid pledge by the company under the circumstances of the case. The fact that the delivery of a

(1) [1906] 1 I. R. 446.

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similar warrant, issued by persons carrying on another business under different circumstances, would have been capable of creating a valid pledge of the goods named therein is not ad rem.

When a warehouse keeper issues his warrant for goods, he has already been constituted a bailee of them by deposit and receipt of the goods themselves. The warrant does not make him bailee; it enables the bailor to make other parties bailors. Its delivery to the depositor of the goods does not effect a delivery of the goods by him to the warehouse keeper, or a delivery of them by the warehouse keeper to him. It warrants a bailment, which has already taken place. Here the case is quite otherwise. Nothing has been delivered to the issuer of the warrant. The goods were in the company's store before the issue and are there after it. The pencil entry of Mr. Doherty's name in the stock-book is as provisional as can be, and is far removed from a statement that the specific goods henceforth are held for him. It is at most a memorandum that he has some interest in or connection with them. In the warrant itself the significant words are "deliverable" and "free storage." "Deliverable" addressed by the distiller to his lender imports a promise to deliver in future rather than an admission that the goods have been delivered already and are now held by Mr. Doherty's agent for him. The written words "free storage" mean no more than they say. The goods are in store and storage will not be charged, but why that should be is not stated or conveyed. The insertion of these words is simply equivalent to the deletion of the printed words beginning "on payment of rent." The goods are the company's goods and are in the company's store. If the document is presented to a proposed transferee the words serve to assure him that, in order to obtain the goods, at any rate it will not be necessary to pay any rent accrued. The expression no more implies that the goods are being held in store for Mr. Doherty, as pledgee, gratis than that they are being held in store gratis in spite of a promise to treat them as charged in his favour. After all it was for Mr. Doherty to make out his case of pledge; with all deference to the learned judges in the Courts below I do not think he proved it. He only established that he was secured, but how secured he left in doubt.

It was urged upon the authority of decided cases, that constructive possession had been given, because the character of the distillery company's possession had been changed from a holding on its own behalf to a holding on behalf of Mr. Doherty. This, however, depends on the circumstances evidencing such a change. No case has been cited which goes far enough to cover the present one. All that has happened is that the company has delivered a piece of paper, not shewn by any mercantile custom to be a symbol of goods, as an indorsed bill of lading is for goods at sea, and has made an enigmatic entry of Mr. Doherty's name in its stock-book. There was no proved relationship between the parties to add colour to the neutral possession. I do not think it necessary to refer to the English cases after the exhaustive examination of them which my noble and learned friend Lord Atkinson has made. It is enough to say that, in my opinion, no case goes the length required by the respondent here. I will only add with regard to the cases cited that the authority of Lord Justice-Clerk Inglis (*Anderson* v. *M'Call* (1)) was invoked in support of the proposition that, as between vendor and vendee, and presumably between pledgor and pledgee, "in order to operate constructive delivery by means of a delivery order, there must be three independent persons—the vendor, the vendee, and the custodier of the goods—and if the custodier of the goods be identified with the vendor, there ceases to be a third independent person." Such an opinion is weighty, but I do not base myself upon it. The Scots decisions on the relation of possession and pledge differ considerably from the English law—see, for example, *Hamilton* v. *Western Bank of Scotland* (2) and compare Bell's Principles of the Law of Scotland, 10th ed., § 1364—and it may be that the principles underlying the two systems of law do not concur on this point.

My Lords, I think that no valid pledge was created in the present case, since no change took place in the character of the company's possession sufficient to complete an agreement to give a pledge by actually putting the pledgee in possession by his bailee. If this is so, I think that your Lordships might well have treated the respondent's claim to a legal pledge as his only case,

(1) 4 Macph. 765, at p. 770. (2) (1856) 19 D. 152.

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and have declined to consider the validity of any other security to which he might lay claim to be entitled in the alternative. Pledge was the only case he pleaded, and this was the case which he established in both the Courts below. It was, however, argued at your Lordships' Bar that his security might be an equitable one, and the appellant contended that, if so, it was bad for want of registration, while the respondent replied that it needed no registration, being "a warehouse keeper's certificate, warrant, or order for the delivery of goods or a document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

That the security in this case was a "charge created or evidenced" by so-called warrants, which "if executed by an individual would require registration as a bill of sale," within the Companies Act, 1900, s. 14, sub-s. 1 (*c*), I make no doubt. The question then is whether it is a document which, if executed by a natural person, would require registration as a bill of sale. The mere fact that the transaction could not be expressed in the statutory form prescribed for bills of sale is beside the point. The statutory requirement of registration of a document issued by a company cannot be defeated merely because a similar document between other parties would have been void on other grounds.

In my opinion these warrants come at any rate within the words in s. 4 of the Bills of Sale (Ireland) Act, 1879, "Any agreement . . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." They may also be "assurances of personal chattels," or "authorities or licences to take possession of personal chattels as security for any debt." The question turns on the wording of these instruments themselves and the circumstances under which they were created in this case. I have already stated my reasons for thinking that their meaning and effect may be very different according as they are issued by warehouse keepers already constituted bailees of the goods, in favour of the holder of the documents, or by a company, itself the manufacturer and

possessor of the goods, which has not received them from anybody, and neither is, nor is supposed to be, a warehouse keeper at all. The goods described as being "deliverable" to Mr. Doherty might or might not be delivered to him. In fact, except in case of insolvency, actual or imminent, the company was not expected to deliver to him or his assigns at all. The document was an offer of a promise to do so, and by accepting and keeping the document he accepted the offered promise.

In my opinion the document is not a warrant or a warehouse keeper's certificate or order for the delivery of goods such as is saved from inclusion in the term bill of sale. It is not proved to be used in the ordinary course of business as proof of the matter specified. The catalogue of instruments which are declared by the Bills of Sale Acts not to be included in the term bill of sale is old. It is common both to the Bills of Sale Acts and to the Factors Acts. It goes back, substantially in the same form, to the Factors Act, 1825, and it is plain that the Legislature intended to save certain documents, already well known in commerce, and others which, by the usage of business, might come into existence notoriously and for the same or similar purposes. I think that immunity from registration cannot depend on the mere adoption of a name or the mere employment of some recognized form. A lodging-house keeper cannot escape the Bills of Sale Acts by squeezing the hypothecation of his furniture into a bill of lading or figuring for the nonce as a dock company and issuing a warrant for it. As I have said, it is unfortunate that no attempt seems to have been made to prove a mercantile practice for distillers to give security over their whisky maturing in bond by issuing warrants in the ordinary course of their business, nor is the absence of such evidence to be accounted for by supposing it to have been dispensed with by admissions made, tacitly or expressly, for the appellants' case takes the point that the warrants were not issued in the ordinary course of business, and it was not objected by the respondent that this had been admitted or taken as common ground.

My Lords, the matter is not one in which we can substitute general mercantile knowledge for evidence of a particular

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practice; still less can we resort to surmise. In my opinion these documents are void for want of registration, and upon this part of the case the appeal must succeed. Upon the rest of the case I think that the appeal fails, and that, for the reasons already given by my noble and learned friend Lord Parker of Waddington, which I need not repeat, the respondent is entitled to the benefit of the trust deed of November 9, 1895. I also think, for the reasons given by my noble and learned friend, that the respondent's preliminary objection fails. In the result the judgments of Barton J. and of the Court of Appeal must be varied by discharging so much of them as declares that the respondent is entitled to a good and valid pledge on the whiskies contained in the warrants in question, with the consequential directions thereon.

Order of the Court of Appeal in Ireland reversed, save so far as it affirmed that portion of the order of Barton J. which declared that the respondent was entitled to a good and valid lien on the debentures mentioned by the 26*th paragraph of the statement of claim, so far as the same affected the freehold and leasehold premises comprised in the trust deed dated November* 9, 1895, *for the amount of the advances, and the said order of Barton J. varied by dismissing the action, so far also as it related to the claims set forth in paragraphs* 3 *and* 4 *of the prayer of the statement of claim, and further varied by directing that the costs of which the said Edward Doherty was to be deprived were to include not only his costs, so far as increased by the claims set forth in paragraphs* 1 *and* 2 *of the prayer of the statement of claim, but also his costs, so far as increased by his claims set forth in paragraphs* 3 *and* 4 *thereof, and that the said Edward Doherty do pay to the liquidator the costs of the said Dublin City Distillery, Limited, in meeting these last-mentioned claims, in addition to the costs*

already by the said order directed to be paid by the said Edward Doherty: Further ordered, that there be no costs of this appeal of the liquidator except the costs incurred by him in respect of the preliminary objection, the said costs to be paid to the liquidator by the said Edward Doherty: Further ordered, that the said Edward Doherty do pay to the liquidator his costs of the appeal to the Court of Appeal in Ireland, save so far as increased by the claim that the respondent was not entitled to any lien or charge in respect of the said debentures, and that the liquidator do pay to the said Edward Doherty his costs in the Court of Appeal in Ireland in meeting that claim; such costs to be set off.

Lords' Journals, July 17, 1914.

Solicitors for appellants: *Charles Russell & Co., for Robert Dickie, Dublin.*

Solicitors for respondent: *Leman & Co., for F. Kennedy & Sons, Dublin.*

[HOUSE OF LORDS.]

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ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF ST. MARYLEBONE . . . . . } Appellants;

AND

CONSOLIDATED LONDON PROPERTIES, LIMITED . . . . . } Respondents.

London—Poor Rate—Valuation—Houses and Buildings let out in Separate Tenements—Rateable Value—Deductions from Gross Value—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 52, *Sched. III.*

Sect. 52 of the Valuation (Metropolis) Act, 1869, provides that in calculating the rateable value of hereditaments for the purposes of the Act the rate of deductions to be made from the gross value shall not exceed the amounts in the Third Schedule to the Act. The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list are to be divided and the maximum rate of deductions to be made in respect thereof, contains in a footnote a provision that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements:—

Held, that the provision in the footnote applied to houses or buildings let out in separate tenements, although such houses or buildings were not separately valued or inserted in the valuation list.

A block of buildings in London was divided into a series of self-contained flats, each having its own front door opening on to a common staircase. Each flat was in the separate occupation of a tenant holding under a lease or an agreement. Each tenant was entered in the valuation list as the rateable occupier and was rated in respect of his occupation. The owner of the block of buildings was not entered in the valuation list as occupier either of the block or of the flats, and the block was not separately valued in the valuation list. The flats were entered in the valuation list and valued as separate rateable hereditaments:—

Held, that in calculating the rateable value of the flats the block was a house or building let out in separate tenements within the meaning of the footnote to the Third Schedule.

Western v. *Kensington Assessment Committee* [1908] 1 K. B. 811 approved.

Decision of the Court of Appeal [1913] 3 K. B. 230 affirmed.

Appeal from a decision of the Court of Appeal affirming a decision of the Divisional Court upon a special case stated by the

* *Present:* Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor.

quarter sessions for the county of London upon an appeal relating to a valuation list made in the year 1910 for the metropolitan borough or parish of St. Marylebone. (1)

The Valuation (Metropolis) Act, 1869, provides (so far as material) as follows:

Sect. 4. "In this Act, unless the context otherwise requires,—

. . . . . .

"The term 'hereditament' means any lands, tenements, hereditaments, and property which are liable to any rate or tax in respect of which the valuation list is by this Act made conclusive:

"The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent:

"The term 'rateable value' means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

Sect. 51. "The valuation list shall be made out in the form given in the Second Schedule to this Act.

"The overseers shall not include in such valuation list any hereditaments (except tithes or payment in lieu of tithes) which are charged according to Rule two in section sixty of the Income Tax Act, but shall include tithes and payments in lieu of tithes and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance with the classes mentioned in the Third Schedule to this Act, so that the deductions to be made in ascertaining the rateable value may be calculated in accordance with that schedule."

Sect. 52. "The percentage or rate of deductions to be made from the gross value in calculating the rateable value for the purposes of this Act shall not exceed the amounts in the Third Schedule to this Act, so far as the same are applicable."

(1) [1913] 3 K. B. 230.

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THIRD SCHEDULE.

Showing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided.

	Maximum Rate of Deductions.
	Per cent. or proportion.
Class 1.—Houses and buildings, or either of them, without land other than gardens where the gross value is under 20*l*. ..	25 or $\frac{1}{4}$th.
,, 2.—Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 20*l*. and under 40*l*.	20 or $\frac{1}{5}$th.
,, 3.—Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 40*l*. or upwards .. .	16$\frac{2}{3}$ or $\frac{1}{6}$th.
,, 4.—Buildings without land which are not liable to inhabited house duty and are of a gross value of 20*l*. and under 40*l*.	20 or $\frac{1}{5}$th.
,, 5.—Buildings without land which are not liable to inhabited house duty and are of a gross value of 40*l*. or upwards ..	16$\frac{2}{3}$ or $\frac{1}{6}$th.
,, 6.—Land with buildings not houses ..	10 or $\frac{1}{10}$th.
,, 7.—Land without buildings	5 or $\frac{1}{20}$th.
,, 8.—Mills and manufactories	33$\frac{1}{3}$ or $\frac{1}{3}$rd.
,, 9.—Tithes, tithe commutation rent charge, and other payments in lieu of tithe ..	To be determined in each case according to the circumstances and the general principles of law.
,, 10.—Railways, canals, docks, tolls, waterworks and gasworks	
,, 11.—Rateable hereditaments not included in any of the foregoing classes	
The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11.	

The respondents were the owners of buildings consisting of two blocks of flats known as Hyde Park Mansions situate in the borough of St. Marylebone.

The question raised by this appeal was whether in ascertaining the rateable values of the several flats comprised in these

buildings the footnote to the Third Schedule applied or whether the maximum rates of deductions specified in the body of the schedule applied.

A certain number of flats were situate on each side of a common staircase which with lifts formed the approach thereto. There were fifteen such common staircases in the buildings. There was no internal communication between the staircases, but all the staircases in each block opened on a courtyard common to the block. Each flat was self-contained and had its own front door opening on to the common staircase and the persons residing in the flats had the common use of the staircase and lifts.

Each flat was in the separate occupation of the tenant and it was an admitted fact that each tenant was an occupier having a separate and distinct rateable occupation of his flat. It was also the fact that each tenant was entered in the valuation list as the rateable occupier and in every rate which had been made since the list took effect the tenant had been rated to the rate in respect of his occupation of his flat and not the owners. The respondents were not entered as occupiers of the building or the flats therein in the valuation list nor in any rate made as aforesaid. The same state of things prevailed in regard to previous valuation lists and rates.

The flats were let on agreements or leases for various terms of years and in many cases the tenant agreed to do all internal repairs. The external repairs were in all cases done by the respondents.

In May, 1910, the valuation committee for the borough duly made a valuation list wherein the several flats contained in the said buildings were inserted as 147 separate rateable hereditaments and each tenant was inserted as the rateable occupier of his flat; but by arrangement with the tenants the rates were in fact paid by the respondents.

The respondents made objections to the valuation list and the appellants made certain alterations in the gross and rateable values of some of the hereditaments in question. In the valuation list as altered the deductions made from the gross values of the several hereditaments in calculating the rateable values thereof were approximately at the rate of 20 per cent., being

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the maximum rate of deductions shewn in the Third Schedule against class 4.

The respondents appealed to quarter sessions against the decisions of the appellants so far as regards the rateable values only and contended that the deductions from the several gross values to arrive at the several rateable values were not limited in law to the maximum deductions set out in the second column of the Third Schedule, but that the footnote to the schedule applied. The appellants (the respondents in the special case) contended that the footnote to the schedule did not apply to the valuation of separately occupied flats.

The Court of quarter sessions were of opinion that the question was concluded by *Western* v. *Kensington Assessment Committee* (1) and allowed the appeal subject to the case stated for the opinion of the Court.

The decision of quarter sessions was affirmed first by the Divisional Court (Lord Alverstone C.J., Channell and Avory JJ.) and afterwards by the Court of Appeal (Vaughan Williams, Buckley, and Hamilton L.JJ.).

Upjohn, *K.C.*, and *Courthope-Munroe*, for the appellants. The houses or buildings referred to in the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869, as is shewn by the prefatory words of the schedule, must be houses or buildings being hereditaments inserted in a valuation list under the Act. The footnote applies to each separate rateable hereditament, being let out in separate tenements, in the valuation list; it does not apply to something which is not in the valuation list at all. The schedule must be construed as a whole and the words "houses and buildings" must have the same meaning throughout. The object of the footnote was to qualify the maximum rate of deductions in classes 1, 2, and 3. [They referred to ss. 4, 6, 45, 51, and 52 and Scheds. II. and III. of the Act.] *Western* v. *Kensington Assessment Committee* (1), by which the Court of Appeal was bound, was wrongly decided and ought to be overruled. In fact the Court was there legislating

(1) [1907] 2 K. B. 323; [1908] 1 K. B. 811.

to avoid an injustice. [They also referred to *Grant* v. *Langston* (1), *Griggs* v. *Stevens* (2), and *Reg.* v. *St. George's Union.* (3)]

Walter Ryde, K.C., and *E. M. Konstam*, for the respondents, were not called upon.

LORD DUNEDIN. My Lords, the question in this appeal turns on a very small though doubtless a very important point. It arises upon a decision of the true meaning of the foot-note to the Third Schedule of the Valuation (Metropolis) Act, 1869. According to the provisions of that Act it is necessary for the several classes into which the hereditaments inserted in the valuation list under the Act are to be divided to be specified, and classes are given, and opposite each class there is a column which deals with the maximum rate of deductions to be allowed. The first five classes deal with houses and buildings, and buildings, without land, and then the next three classes deal with land with buildings, land without buildings, mills and manufactories, and then come three other classes of other sorts of hereditaments altogether; 9 is "Tithes, tithe commutation rent charge," &c.; 10 is "Railways, canals, docks" and so forth, and then 11 is a general provision which includes everything which is not included before. Then comes the footnote in question, which is, "The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11." The kind of property upon which the question arises is the kind of property known as flats, and the particular flats here are flats of a kind which are now very common in the metropolis, that is to say, a large building divided into separate houses and separate flats with certain things in common, but each one forming a separate dwelling.

My Lords, the contention of the appellants here is that the meaning of the schedule is that the note should not be held as applying to any particular item which appears as a separate hereditament unless that item which appears as a

(1) [1900] A. C. 383, at p. 397. (2) (1909) 74 J. P. 67.
(3) (1871) L. R. 7 Q. B. 90.

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separate hereditament is let out in separate tenements. The construction on the other hand is that the meaning of the clause is that the maximum rate of deductions prescribed shall not apply in a case where you are dealing with houses or buildings let out in separate tenements. The same point was undoubtedly presented to the Court in the case of *Western* v. *Kensington Assessment Committee*. (1) There, as here, the flats were entered as separate hereditaments, and notwithstanding that fact the Court there came to the conclusion that the blocks of buildings in that case were houses or buildings let out in separate hereditaments within the meaning of the footnote.

My Lords, I confess that reading the footnote as I find it it seems to me that that is the natural meaning. I think it was meant to deal generally and not to be treated so critically as the argument of the appellants demands. The matter is put with admirable clearness by Buckley L.J., and all I can say is that I see no reason whatever to upset the practice which has been followed for several years upon the judgment given by the various learned judges in the *Western Case*. (1) I move your Lordships that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, I concur. I have heard nothing to induce me to differ from the decision appealed from, and I adopt, if I may, the line of reasoning of Buckley L.J. and the conclusion at which he arrived.

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD PARMOOR. My Lords, I concur. If that which is physically a house or building is let out in separate tenements the rate of deduction, in order to reduce the gross value to the rateable value, should be determined, not under the percentage or proportion included in the maximum rate of deductions, but in each case according to the circumstances and the general principles of law, as in clauses 9, 10, 11 of the Third Schedule to the Valuation (Metropolis) Act, 1869. It makes no difference

(1) [1907] 2 K. B. 323; [1908] 1 K. B. 811.

that the house or building is not included in the valuation list as a separate unit for rating.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 18, 1914.

Solicitors for appellants: *Sharpe, Pritchard & Co.*
Solicitors for respondents: *Charles Stevens & Drayton.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 *July* 20.

LUMSDEN . . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE . RESPONDENTS.

Revenue—Increment Value Duty—Occasional Site Value—Sale of Fee Simple—Mode of Calculation—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 2, 25.

Sect. 2, sub-s. 2, of the Finance (1909-10) Act, 1910, provides that the site value of land for the purposes of increment value duty on the occasion of a sale shall be taken to be the value of the consideration for the transfer subject to the like deductions as are made in Part I. of the Act as to valuation for the purpose of arriving at the site value of land from the total value:—

Held by Viscount Haldane L.C. and Lord Shaw of Dunfermline (affirming the decision of the Court of Appeal), that in making these deductions the gross value and total value were to be ascertained by valuation as provided by s. 25 of the Act.

Held by Lord Moulton and Lord Parmoor, that the gross value and total value were to be ascertained by reference to the consideration.

In 1910 the appellant sold the fee simple of a house subject to tithe of a capital value of 33*l.* for 750*l.* At the time of the sale the estimated gross value and the full site value were the same as in the provisional valuation, namely, 658*l.* and 228*l.* The original assessable site value was 105*l.* A deduction of 90*l.* was allowable for expenditure on the land:—

Held by Viscount Haldane L.C. and Lord Shaw of Dunfermline (affirming the decision of the Court of Appeal), that the proper mode of

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* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARMOOR.

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calculating the increment value under the Act was to deduct from the purchase price of 750*l.* the difference between the 228*l.* full site value and the 658*l.* gross value, namely, 430*l.*, plus the 90*l.*, leaving 230*l.* or an excess of 125*l.* over the assessable site value of 105*l.*; and that therefore increment value duty was payable on the sum of 125*l.*

Held by Lord Moulton and Lord Parmoor, that the gross value was to be taken to be the purchase price plus the value of the tithe, namely, 783*l.*, and that the deductions should proceed on that footing, with the result that the occasional site value was the same as the original assessable site value and no increment value duty was payable.

Decision of the Court of Appeal [1913] 3 K. B. 809 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Horridge J. (2) on a case stated by a referee under the provisions of the Finance (1909-10) Act, 1910.

The appeal raised a question as to the right way of arriving at the site value of real property on the occasion of the sale of the property for the purpose of ascertaining whether there had been any increment of site value between April 30, 1909, and the date of the sale. This question depended mainly upon the construction of ss. 2 and 25 of the Finance (1909-10) Act, 1910.

Sect. 2: "(1.) For the purposes of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation.

"(2.) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—

"(*a*) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer; and

"(*b*) where the occasion is the grant of any lease of the land, or the transfer on sale of any interest in the land, the value of the fee simple of the land, calculated on the basis of the value of the consideration for the grant of the lease or the transfer of the interest; and

"(*c*) where the occasion is the death of any person, and the fee simple of the land is property passing on that death, the

(1) [1913] 3 K. B. 809. (2) [1913] 1 K. B. 346.

principal value of the land as ascertained for the purposes of Part I. of the Finance Act, 1894, and where any interest in the land is property passing on that death the value of the fee simple of the land calculated on the basis of the principal value of the interest as so ascertained; and

"(*d*) where the occasion is a periodical occasion on which the duty is to be collected in respect of the fee simple of any land or of any interest in any land held by a body corporate or unincorporate, the total value of the land on that occasion to be estimated in accordance with the general provisions of this Part of this Act as to valuation;

subject in each case to the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value.

"(3.) Where it is proved to the Commissioners on an application made for the purpose within the time fixed by this section that the site value of any land at the time of any transfer on sale of the fee simple of the land, or of any interest in the land, which took place at any time within twenty years before the thirtieth day of April, nineteen hundred and nine, exceeded the original site value of the land as ascertained under this Act, the site value at that time shall be substituted, for the purposes of increment value duty, for the original site value as so ascertained, and the provisions of this Part of this Act shall apply accordingly.

"Site value shall be estimated for the purposes of this provision by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer, where increment value duty is to be collected on the occasion of such a transfer after the passing of this Act.

"This provision shall apply to a mortgage of the fee simple of the land or any interest in land in the same manner as it applies to a transfer, with the substitution of the amount secured by the mortgage for the consideration.

"An application for the purpose of this section must be made within three months after the original site value of the land has been finally settled under this Part of this Act."

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Sect. 25: "(1.) For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.

"(2.) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings and of all growing timber, fruit trees, fruit bushes, and other things growing thereon.

"(3.) The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the thirtieth day of April nineteen hundred and nine, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final.

"(4.) The assessable site value of land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

"(*b*) any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or

expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; and

"(*c*) any part of the total value which is proved to the Commissioners to be directly attributable to the appropriation of any land or to the gift of any land by any person interested in the land for the purpose of streets, roads, paths, squares, gardens, or other open spaces for the use of the public; and

"(*d*) any part of the total value which is proved to the Commissioners to be directly attributable to the expenditure of money on the redemption of any land tax, or any fixed charge, or on the enfranchisement of copyhold land or customary freeholds, or on effecting the release of any covenant or agreement restricting the use of land which may be taken into account in ascertaining the total value of the land, or to goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land; and

"(*e*) any sums which, in the opinion of the Commissioners, it would be necessary to expend in order to divest the land of buildings, timber, trees, or other things of which it is to be taken to be divested for the purpose of arriving at the full site value from the gross value of the land and of which it would be necessary to divest the land for the purpose of realising the full site value.

"Where any works executed or expenditure incurred for the purpose of improving the value of the land for agriculture have actually improved the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture, the works or expenditure shall, for the purpose of this provision, be treated as having been executed or incurred also for the latter purposes.

"Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section."

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The appellant appealed to a referee against an assessment whereby he was assessed to increment value duty under ss. 1 and 2 of the Act in respect of a dwelling-house and shop, No. 32, Lansdowne Road, Forest Hall, Northumberland, and a gross duty of 25*l.* was charged in respect of an alleged gross increment value of 125*l.*

The figures appearing from the provisional valuation, which was annexed to the report of the referee, were as follows:—

Original gross value - - - - - - -	£658
Original full site value (arrived at by deducting from the gross value the difference between that value and the value of the fee simple of the land divested of buildings, trees, &c.—£430) - - - -	£228
Original total value (arrived at by deducting from the gross value the capitalized value of tithe to which the property was subject—£33) - - - -	£625
Original assessable site value (arrived at by deducting from the total value the deductions from gross value to arrive at full site value as above—viz., £430, and the value of works executed on the land —£90 = £520) - - - - - - - -	£105

The material paragraphs of the case were as follows:—

3. The occasion on which the duty was alleged to become payable was a sale on August 23, 1910, by the appellant of the fee simple of the said dwelling-house and shop to a buyer, who took possession for the purpose of carrying on a business in the shop. The sale was of the property subject to the burden of tithe, which tithe is referred to in the said provisional valuation of the capital value or burden of 33*l.*

4. On February 9, 1911, the said dwelling-house and shop (hereinafter called "the property") were provisionally valued under the Act as at April 30, 1909, and this valuation was accepted by the appellant raising no objection within the time prescribed by the Act.

5. The consideration for the transfer on sale on the occasion giving rise to the claim was 750*l.*

6. At the time of the sale the fee simple of the property if sold in the open market by a willing seller in its then condition free

from incumbrances and from any burden, charge, or restriction, other than rates and taxes, might have been expected to realize the sum of 658*l.*

7. It was admitted that there had been no variation in the full site value between April 30, 1909, and August 23, 1910, and that that value was 228*l.* on each date. It was also admitted that 90*l.* represented the amount of deduction for roads to be made under s. 25, sub-s. 4 (*b*), from the total value to arrive at the assessable site value. The capital value of the tithe was admitted to be 33*l.*

8. It was contended before me on behalf of the appellant that :—

(*a*) The increment value is either, (A) the difference between the original assessable site value of 105*l.* (fixed by the said provisional valuation) and the assessable site value on the occasion of the sale, which is in the present case to be taken to be the value of the consideration for the transfer on the sale to Mrs. Stobie subject to the like deductions as are made under the general provisions of Part I. of the Act as to valuation for the purpose of arriving at the site value of land from the total value, or (B) the difference between the original full site value of 228*l.* and the admitted full site value of 228*l.* on the present occasion when the increment value is to be collected. In order, therefore, to arrive at the result here on the footing of (A) the following considerations must be applied :—

(1.) The fee simple was sold subject to tithe of 33*l.* capital value for 750*l.*, therefore the gross value (which in this case is the fee simple value free from tithe—see s. 25, sub-s. 1) is 783*l.*

(2.) It was admitted the full site value at the time of sale was 228*l.*, the same as in the provisional valuation.

(3.) Therefore the difference between gross value and the full site value was 555*l.*

(4.) The sale price gives the total value, namely, 750*l.*, for that was the price subject to tithe.

(5.) Therefore the "assessable site value" is the total value (750*l.*) after deducting (A) the deduction of 555*l.* and (B) 90*l.* attributable to roads.

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(6.) The "assessable site value" for calculating increment duty is 105*l.*, i.e., after deducting from 750*l.* 555*l.* + 90*l.*, i.e., 645*l.*

(7.) There is therefore no increment value.

On the footing of (B) it is also the case that there is no increment value.

(*b*) In the alternative, that if there was any increment within the meaning of the Act it was attributable to some one or more of the elements mentioned in the appellant's notice of appeal.

9. It was contended before me on behalf of the Commissioners of Inland Revenue:—

(1.) That under s. 2, sub-s. 1, of the Act the increment value is to be deemed to be the amount, if any, by which the site value of the land on the occasion, ascertained in accordance with the said section, exceeds the original site value of the land as ascertained in accordance with the general provisions of the First Part of the Act.

(2.) That the site value of the land on the occasion was in this case the value of the consideration, i.e., 750*l.*, subject to the like deductions as are made under s. 25, sub-s. 4, to arrive at site value of land from total value.

(3.) That the first deduction to be made under and by virtue of s. 25, sub-s. 4 (*a*), read with s. 25, sub-s. 2, of the Act, is the difference mentioned in s. 25, sub-s. 2, i.e., the difference between gross value and value divested.

(4.) That the gross value of the land being as found by the referee 658*l.*, the value of the site divested being also as found by him 228*l.*, the difference amounted to 430*l.*

(5.) That there being no other deduction except the deduction for roads, which is found by the referee at 90*l.*, the total amount of the deduction is 520*l.*

(6.) That deducting the 520*l.* from the value of the consideration, namely, 750*l.*, the result is 230*l.*

(7.) That this 230*l.* is the site value of the land on the occasion, arrived at in accordance with the provisions of the Act.

(8.) That increment value duty is exigible on the difference between 230*l.*, the site value on the occasion, and 105*l.*, the original site value of the land as found in the provisional valuation.

10. I am of opinion, and I decide, that contention (A) of the appellant is correct, and I accordingly award and decide that the appellant is not liable to pay any increment value duty on the occasion in question, and that the expenses of the appellant of and incidental to his appeal be borne and paid by the Commissioners of Inland Revenue.

11. If the Court should be of opinion that the contention of the Commissioners of Inland Revenue is correct, then I award and decide that contention (B) of the appellant was not made good, and that the appellant is liable to pay the increment value duty claimed by the Commissioners of Inland Revenue, and that the expenses of the Commissioners of Inland Revenue of and incidental to the appeal of the appellant be borne and paid by the appellant.

Horridge J. reversed the determination of the referee and held that the contention of the Crown was correct and that increment value duty was payable on the sum of 125*l.*, and his decision was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Swinfen Eady L.J. dissenting).

Upon the appeal to this House the appellant relied solely upon contention (A) mentioned in paragraph 8 of the case.

1914. June 18, 19, 22, 23, 25. *Sir Robert Finlay, K.C.*, and *W. Allen*, for the appellant. The increase in the price at which this property was sold was due to the fact that the property had a special value to the purchaser and not to any increase in the site value. But increment value duty is chargeable only where there has been in fact an increase in the site value: *Inland Revenue Commissioners* v. *Herbert.* (1) Increment duty is not a tax on casual profits derived from the sale of land, but only a tax on increment in the value of land. It is contrary to the scheme of the Act to tax something which is not site value. The meaning of the Act is that where there is a sale the price i the basis on which the deductions under the Act are to be made. The consideration is to be taken as the total value and the consideration plus the capitalized value of the fixed charges as the gross value, and the deductions are to be made on that

(1) [1913] A. C. 326.

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footing. Sect. 2 says "the like" not "the same" deductions. By the method of calculation contended for by the Crown increment duty will be charged on something which is not increment at all. The Court always struggles against the more literal construction of a statute if it is opposed to the intention of the Legislature as apparent by the statute itself, and especially where that construction leads to a result which is absurd and inequitable: *Caledonian Ry. Co.* v. *North British Ry. Co.* (1) Where there has been an actual transaction of sale there is no room for valuation as the method of ascertaining the total value of the land. [They also referred to *Hayllar* v. *Inland Revenue Commissioners* (2) and *Inland Revenue* v. *Walker*. (3)]

Sir John Simon, *A.-G.*, and *Sir Stanley Buckmaster*, *S.-G.* (with them *W. Finlay*), for the respondents. Effect must be given to the plain language of the statute. Sect. 2 says that to ascertain the site value on the occasion of a sale you are to take the consideration as the starting point and are then to make deductions therefrom on the basis of s. 25. That section prescribes the method by which the total value and the gross value of land are to be ascertained, and the statute contains nothing which justifies any departure from that. The statute does not say you are to strike out total value for all purposes and it contains no authority for arriving at the gross value on the occasion of a sale by taking the consideration and adding to it the value of the fixed charges. The gross value depends upon what you might reasonably be expected to get for the land on a sale in the open market, not on the amount of the consideration paid on a particular occasion. Moreover, there is a finding by the referee that the gross value was 658*l*. Upon any point of view there must be on the occasion of a sale some hypothetical calculation, namely, for the purpose of ascertaining divested value, and there is not of necessity any greater difficulty in estimating gross value than divested value. The appellant's contention involves a meaning of gross value which is nowhere to be found in the Act. Upon the appellant's

(1) (1881) 6 App. Cas. 114, at p. 122.

(2) [1914] 1 K. B. 528.

(3) (1913) 50 S. L. R. 470.

construction the result would be the same whatever the amount of the consideration, and there would be no object in bringing the consideration money into the calculation at all.

Sir R. Finlay, K.C., replied.

The House took time for consideration.

July 20. VISCOUNT HALDANE L.C. My Lords, this appeal raises a question of much difficulty which has been the subject of elaborate argument at the Bar. But the real point lies within narrow limits, and turns on the proper construction of a few words in a statute, the Finance (1909-10) Act, 1910. The sections of this Act which relate to duties on land values have obviously been drafted with remarkable skill. But the subject was so novel and so complicated that it was inevitable that questions should arise on which the meaning of the Legislature has not been made wholly free from ambiguity. The duty of a Court of construction in such cases is not to speculate on what was likely to have been said if those who framed the statute had thought of the point which has arisen; but, recognizing that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself, read as a whole.

My Lords, the appellant has been held liable for increment duty arising upon the occasion of a sale by him of a dwelling-house and shop. By the Act of Parliament the duty is charged on the increment value of land. This increment value is the amount by which what is called the site value exceeds, on the occasion on which the duty arises, the original site value. Such is the effect of ss. 1 and 2.

Before referring further to the provisions of s. 2, which give a special meaning to site value on this occasion, it will be convenient to turn to the later sections in order to see what various values mean when spoken of generally in the Act. By s. 26 a valuation of all land is to be made, shewing separately the total value and the site value. These are defined in s. 25, together with two other values. The first of the four values there defined is gross value, which means the amount which the fee simple of

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the land, if sold in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates and taxes), might be expected to realize. The second value is full site value, which means the value which the fee simple, if similarly sold, might be expected to realize if the land were divested of all buildings and structures appurtenant to such buildings, and of all growing timber and other things growing on the land. The third value is total value, which means the gross value after deducting the amount by which this gross value would be diminished if the land were sold subject to any fixed charges (afterwards so defined as to exclude mortgages), or public rights of way, or user, or rights of common, or easements, or certain kinds of restrictive covenant or agreement. The fourth value is assessable site value, which means the total value after making various deductions. These include the same amount as is to be deducted for the purpose of arriving at full site value from gross value, and also value directly attributable, in the case of a non-agricultural property such as that under consideration, to, among other things, roads. There are other deductions to be made from total value in arriving at assessable site value, but these need not for the moment be considered. The section also provides towards its close that any reference in the statute to site value, other than a reference to it on an occasion on which increment duty is to be collected, is to be deemed to be a reference to assessable site value as ascertained in accordance with the section.

Turning back to s. 2, it first enacts that the increment value of any land is to be deemed to be the amount by which the site value, on the occasion on which increment value duty is to be collected after being ascertained in accordance with this section, exceeds the original site value, ascertained in accordance with the general provisions of the Act as to valuation. The section then provides that the site value on the occasion on which increment duty is to be collected is to be taken to be, where, as here, the occasion is a transfer on sale of the fee simple, the value of the consideration for the transfer. I observe that among the other enumerated occasions are the periodical occasions on which the duty is to be collected in respect of the fee simple of land

held by a body corporate or unincorporate, in which cases the total value is to be estimated in accordance with the general provisions as to valuation to which I have already referred. In all these instances the site value thus defined is to be "subject in each case to the like deductions as are made under the general provisions of this Part of this Act as to valuation for the purpose of arriving at the site value of land from the total value."

My Lords, it is upon the construction of the words which I have just quoted that the question to be decided turns. The appellant contends that the expression "like deductions" means, where the case is one of transfer on sale, that deductions are to be made from the value of the consideration in their character resembling or analogous to, but not identical in amount with, those which are made when, under the general provisions as to valuation, site value is ascertained from total value. The argument on his behalf is that, in applying the analogy of the process of deduction prescribed by s. 25 for the ascertainment of assessable site value, you are to start from the amount of the value of the consideration as though it were a total value, and then make the kind of deductions that are prescribed in s. 25, where the start is made from total value which is merely estimated.

The respondents, on the other hand, contend that the words "like deductions" are not ambiguous. They point to the language of s. 25, sub-s. 4 (*a*), as defining the first deduction to be "the same amount as is to be deducted for the purpose of arriving at full site value from gross value." They argue that there is, therefore, no room for making any other deduction than this varying amount which is to be, if they are right, ascertained with reference, not to the value of the consideration, but to the difference between the estimated gross and full site values.

My Lords, before considering the question of construction thus raised, I desire to refer to the facts out of which the appeal has arisen. The referee under the Act stated a special case. He found that the consideration for the transfer on sale was 750*l.*, and that the fee simple had been sold subject to tithe of 33*l.* capital value. He found further that the amount of deduction to be allowed under s. 25, sub-s. 4, for the making of roads was 90*l.* He also found as follows: At the time of the sale the fee

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simple of the property, if sold in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restraint other than rates and taxes (the words of the sub-section defining gross value), might have been expected to realize 658*l.* It was admitted that there had been no variation in the full site value between April 30, 1909 (the date as on which the original valuation had to be made), and August 23, 1910, the date of the sale. It was agreed, he said, that the full site value was 228*l.* on each date. The original assessable site value was 105*l.*

My Lords, the important controversy between the parties which arose on these findings was as follows: The appellant maintained that the deductions directed by s. 2 to be made from the value of the consideration must be made from the 750*l.* and 33*l.* (the amount of the capital charge for tithe), in order that the analogy of the deduction from gross value might be followed. As the full site value at the time of sale had by admission remained at 228*l.*, the difference between gross value and full site value must be taken to be 555*l.* Therefore, on the footing that the sale price of 750*l.* was to be taken as representing the total value for the purpose of ascertaining the proper deductions, it was from this figure that the 555*l.* must be deducted, and this subtraction, after allowing 90*l.* as a further deduction for roads made, resulted in an assessable site value of 105*l.* There was, therefore, no increment value. For according to the original valuation which was annexed to the referee's report, the original gross value was 658*l.*, the original total value that amount minus the 33*l.* capital value of tithe, i.e., 625*l.*, the original full site value 228*l.*, and the original assessable site value 105*l.*, the same amount as on the occasion of the sale.

The respondents challenged this basis of calculation, contending for a different construction of s. 2. Accepting the figures, they said that as the gross value had been found at the time of the sale to be 658*l.*, and the full site value to be 228*l.*, the difference really prescribed by the Act of Parliament was 430*l.* They maintained that, on the facts found, there could be no further deduction, the gross value having been so found, excepting the 90*l.* for roads, and that the total amount

of deduction from the 750*l.* was therefore 520*l.*, which gave a site value of 230*l.*, and resulted in increment duty being exigible on the difference between this and the original site value of 105*l.*

The referee took the view of the appellant. On appeal Horridge J. disagreed with the referee, and adopted the contention of the Crown. In the Court of Appeal Cozens-Hardy M.R. and Kennedy L.J. agreed with Horridge J., but Swinfen Eady L.J. differed. "The real crux of the matter lies," he said, "in the contention that the direction to make 'the like deductions' from the 'consideration for the transfer' involves a direction to arrive at a new gross *estimated* value of land on the occasion of a sale." He held that the statute contained no direction to make a new valuation of gross value on the occasion of a sale, and that full effect could be given to the direction to make "the like deductions" by starting with the actual consideration realized and making such deduction as was necessary to ascertain the divested or full site value. He thought that this was the only method which achieved the purpose of the Act, which was to tax an actual difference between present and past site value.

My Lords, two observations occur to me at once on this reasoning. The first is that it assumes that site value on the occasion of sale when directed to be ascertained for the purposes of increment duty means the same thing as site value when directed to be ascertained for the purposes of the original valuation. The second observation is that the learned Lord Justice regarded himself as bound, or at least at liberty, to construe as ambiguous the words in s. 2, sub-s. 2: "Subject in each case to the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value." I have for the second time quoted the words in full, because they seem to me to contain the whole point on which this appeal turns. Does "the like" mean in this context anything different from "like in amount and method of calculation"? Can the use of the words "the like" be taken to import an instruction to make deductions on another basis than that of the valuation which is expressly mentioned, and can the actual price be

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substituted, consistently with the language used, for total value as ascertained by valuation ?

My Lords, it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation.

It may seem to some unlikely that the Legislature should have meant to put a tax on anything but an increase in site value strictly so called. It is no doubt true that if the construction argued for by the Crown is right, something more than site value will be taxed in cases in which, by a lucky chance, or by reason, for example, of some special attraction about the building, a larger price has been realized than would have been anticipated by a competent valuer estimating on the hypothesis of a sale to an ordinary buyer willing to give the full price in an open market.

But if this be what the words used appear when read naturally to direct, that interpretation can only be displaced by shewing that the Act intended by the expression site value, when used in connection with increment value, the same thing as site value when used in relation to original assessable site value. Yet this may well not be so. For in the definition of site value which occurs towards the end of s. 25, and has already been quoted, it is expressly provided that a reference to site value in the Act on an occasion when increment duty is to be collected is not, as in other cases, to be deemed to be a reference to assessable site value as ascertained in accordance with s. 25. The construction of the appellant assumes, in dealing with the deductions, the actual price as the starting point in place of estimated total value, and proceeds to deduct from this the difference between the former and the amount of full site value, which must always

be an estimated value. The amount to be subtracted must therefore always vary with the price. If the price is great it will be proportionately great, if the price is small it will be proportionately small. As full site value is an estimated and not an actually received value, and does not depend on the accident of a good or a bad sale, the assessable site value is thus, on the appellant's construction, the same whatever the price on the particular occasion may be.

On the construction of the Crown, which treats the amount to be deducted from the price as the difference between the estimated gross and full site values, the site value to be taxed for the purposes of increment duty will vary with the actual price. If this is large the subject may have to pay something more than what, for the purposes of other parts of the Act, is estimated to be assessable site value. But if the actual price received be below the estimated market value he may be proportionately relieved from increment duty on the normal amount of site value strictly so called. The difference between the two methods is that, according to the appellant's contention, the casual price, which may be greater or less than would normally be expected, is to govern, while according to the Crown the normal price, i.e., that which might be expected to be obtained under ordinary circumstances in an open market from a willing buyer, is decisive. According to the latter construction windfalls will to some extent be taxed, whatever they may be due to, site, buildings, or anything else. But, on the other hand, depreciation in the auction room by reason of forced sales or other adverse contingencies is mitigated.

That this is so appears to me to be plain when alternative figures in the case based on the two interpretations are compared. On the appellant's interpretation of the Act, which substitutes for the total value in s. 25, sub-s. 4, the actual price received, it is immaterial whether that price is great or small so far as the assessable site value on the occasion of sale is concerned. In the case before us this must always be on that construction 105*l*. The reason is that gross value is made dependent on actual price, and the difference to be deducted under s. 25, sub-s. 4 (*a*), between the amount of gross value and the full site value, which is

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estimated, will, therefore, vary proportionately to the price. The resulting figure for assessable site value is accordingly dependent on the estimated full site value, and on any deductions to be made from the total value, that is the price, under clauses (*b*), (*c*), (*d*), and (*e*) of s. 25, sub-s. 4. Supposing the original site value to have increased, the landowner will accordingly be taxed on the increase, notwithstanding that the circumstances under which he sold have made him accept a price much less than the normal value in the market. But this is not the case if, as the Crown contends, that normal value is to be the decisive factor. If the sale price had been, say, 520*l.* instead of 750*l.*, the difference of 230*l.* would have been extinguished if the method of the Crown had prevailed, and no duty would have been payable.

My Lords, I think that as regards increment duty, at all events, the Legislature may, so far as the general policy of the statute is concerned, have contemplated either of these methods. It is to the precise expressions used in the case of increment value that we have therefore to look for guidance. Now, when I turn to s. 25 to find the character and amount of "the like deductions" which are directed to be made by its provisions as to valuation for the purpose of arriving at site value from total value, I meet with what appear to me to be directions which are prima facie unambiguous.

The first deduction directed by s. 25, sub-s. 4, is to be the same amount as is to be deducted for the purpose of arriving at full site value from gross value. My Lords, both of these values, as referred to in this section, are values estimated as probably to be secured under normal and fixed market conditions. They have, and can have, nothing to do with sums which may result from sales in the contingent circumstances of special occasions. And I am wholly unable to read the expression "like" in s. 2, sub-s. 2, as naturally meaning that the principle on which the language used directs them to be estimated is to be departed from. "Like" may not import identity of amount as definitely as the use of the word "same" would have done. But at least it connotes resemblance in main features.

Now to my mind the most prominent of these main features is that in s. 25, the section pointed to, the Legislature is dealing

with, not actually realized prices, but estimated amounts to be calculated by the method of valuation which ss. 25 and 26 prescribe. I find myself unable to agree here with a judge for whose views I always entertain much respect, Swinfen Eady L.J., who thinks that the Act cannot be read as containing any direction to arrive at a gross value of land on the occasion of sale. The scheme of the Act appears to me to provide for all the valuations that from time to time may become necessary. For instance, in the case of increment duty s. 2, sub-s. 2 (*d*) directs the estimation by valuation, in the case of a periodical collection of increment duty payable by a body holding land, of the total value, and this implies the ascertainment of gross value as its basis. There is no reason to think that the duties of the valuers are confined to the estimation of original values only. Again s. 28 expressly provides in the case of undeveloped land duty for periodical revaluations.

In the case of increment value duty it appears to me that Parliament must, on the literal construction of its language, be taken to have contemplated the possible taxation of either something more or something less than site value strictly so called. The amount of the duty, whichever construction is adopted, is in the case of increment duty based on deduction from the actual price as the starting point. For the rest the ascertainment of the normal market price, that is to say, valuation, seems to me to be prescribed as the basis on which deductions are to be estimated.

It was argued by Sir Robert Finlay that the deductions directed after that under clause (*a*) in s. 25, sub-s. 4, cannot properly be made from estimated value. Clause (*b*) directs the deduction of any part of the total value which is proved to be attributable to works executed or expenditure of a capital nature made under certain specified conditions. Clause (*c*) directs deduction of such part of the total value as is directly attributable to appropriations or gifts of land by persons interested in it for streets and other public purposes. Clause (*d*) excludes any part of the total value which is attributable to the redemption of land tax, fixed charges, enfranchisement in the case of copyholds or customary freeholds, release of restrictive covenants or

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agreements, or to goodwill or any other matter which is personal to the owner or other persons interested in the land. Clause (*e*) directs the deduction of any sums which, in the opinion of the Commissioners, it would be necessary to expend in order to strip the land for the purpose of arriving at full site value from gross value and of realizing full site value. My Lords, I do not see why each of these deductions, so far as they relate to total value, should not be made from estimated total value just as easily as from actual price, and the former alternative is, in my opinion, the only one which is "like" that which the literal meaning of s. 2, sub-s. 2, points to.

There are two other remarks which I wish to make before concluding. The first is that the appellant's construction of the word "like" in s. 2, sub-s. 2, compels him to hold himself at liberty to construct a new "gross value" of a kind not resembling that defined by s. 25. He has to treat gross value as meaning, for the purposes of his calculation, the sale price plus the capital value of the tithe. For this I can find no direction in the words of the Act. The second observation relates to Sir Robert Finlay's reliance on s. 2, sub-s. 3, which substitutes for original site value in 1909 the site value at the time of any transfer on sale within twenty years of that period, to be estimated by reference to the consideration given.

I think that this provision, which is in the nature of an option to the person sought to be taxed, is more favourable to him, assuming that he can surmount the difficulty of proof as to past estimated values, on the construction of the Crown than on that of the appellant, under which variation of actual price cannot, as it seems to me, affect the result. For this opinion I have in previous observations already given reasons which apply equally here. Nor do I think that s. 3, sub-s. 5, affects the general question. As I observed in *Commissioners of Inland Revenue* v. *Herbert* (1), it is a difficult section to construe, but on no construction does it appear to me to bear on the decision of the only point which we have to settle at present.

My Lords, I said at the beginning that the duty of judges in construing statutes is to adhere to the literal construction unless

(1) [1913] A. C. 326.

the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation.

For the reasons I have given, I think that there is nothing in the context or general structure of the Finance Act before us that renders it necessary to read the words which have given rise to the present litigation otherwise than as the majority of the judges in the Courts below have read them. With the conclusion reached by Horridge J. and by the majority in the Court of Appeal I find myself in agreement, and I am of opinion that their judgments ought be affirmed.

LORD SHAW OF DUNFERMLINE. (1) My Lords, the question between the parties on this appeal is whether the appellant is liable to pay increment value duty upon the occasion of a sale by him of a dwelling-house and shop in the county of Northumberland. The sale took place on August 23, 1910—that is to say, about sixteen months after the original valuation in terms of the statute. It was a sale of the fee simple. The price obtained was 750*l.* The property was sold subject to the burden of tithe of 1*l.* per annum, the capital value of which is 33*l.*

Under the Finance Act this property had been valued, and the valuation was as at the statutory date, namely, April 30, 1909. In terms of s. 27, sub-s. 1, of the Finance Act of 1910, the value shewn in this original valuation must be "adopted as the original total value and the original site value respectively for the purposes of this Part"—that is the valuation part—"of this Act." So that two elements have become fixed by reason of what has been done under the head of valuation under the statute; that is to say, the original total value and the original site value are definitely settled. These values were as follows. The original total value was 625*l.* and the original site value was 105*l.* These were arrived at by adopting calculations and making deductions, all in terms of the statute; but it is important to state and to keep in view that per the entries in the Domesday Book and in terms of the statute the original total value and the original site value have been precisely ascertained.

(1) Read by Lord Atkinson.

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The property, having this original total value and original site value per the statute, was, as mentioned, sold, and the price obtained for its fee simple, subject as before to tithe, was 750*l.* That also is a fixed figure. My Lords, there may be many calculations and deductions, but it is plain that not one of these amounts that I have mentioned dare be departed from or violated.

The question which arises has reference to the duty called increment value duty. It is necessary carefully to attend to what the statute specifically declares that this "shall be deemed to be." Sect. 2, sub-s. 1, declares that "for the purpose of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land on the occasion on which increment value is to be collected, as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation." It is plain that the increment value consists in the excess of one of these site values, namely, the site value on the occasion of increment value collection, over the other site value, namely, the original site value. To ascertain how much the occasional site value exceeds the original site value you must find out what the amount of each factor is. Each of these factors—these site values—is also a result of a process of deduction of one element from another, and you cannot reach either site value except by scrupulously conforming to the Act, taking the statutory elements and following the statutory process of deduction. Thus and thus only is "site value" reached. I examine these factors in turn.

As to the occasional site value: "(2.) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—(*a*) where the occasion is the transfer on sale of the fee simple of the land, the value of the consideration for the transfer . . . . subject to the like deductions as are made under the general provisions of this Part of this Act as to valuation for the purpose of arriving at the site value of land from the total value." The consideration has been fixed; there is no difficulty about that: it is 750*l.* But what are the "like

deductions"? The statute prescribes that they are the like deductions as in valuation are made from the total value for the purpose of arriving at the site value of the land. The Act appears to me to say: Although this is not the original valuation period, but a subsequent occasion, you must get at the deductions on the like principle and method as was originally adopted. For whether for valuation purposes originally or for increment value duty purposes subsequently, these deductions are the things which must be kept out. As I shall shew presently, the principal item of these deductions is, in fact, the element of buildings, fixed machinery, timber, and what for short may be described as permanent visible improvements. No increment value duty itself is to fall upon these improvements. This consideration is vital.

The method of reaching the deduction figure is the method adopted in s. 25 in ascertaining assessable site value. By s. 25, sub-s. 4, the assessable site value means the total value under certain deductions set forth there; and what, in my opinion, the statute clearly declares is that, on the occasion of making calculations for increment value, the deductions, e.g., the improvements, are to come off the amount of the consideration received. That, in my view, you cannot avoid. With regard to deductions they must be the like deductions as are made in getting at assessable site value, that is to say, deductions made from the total value for arriving at the site value. In this way s. 25, sub-s. 4, becomes fairly clear: "The assessable site value of land," it provides, means the total value after deducting certain specified things.

My Lords, I pause there for a moment to remark that these deductions under s. 25—it must never be left out of view—are deductions from the total value as ascertained under that section. Unless the total value be taken as the datum from which certain deductions are to be made in order to ascertain the assessable site value, and unless that be adhered to, confusion is sure to emerge. But once the deductions thus made are quantified in money, then you are put in possession of a figure derived from the methods adopted at the original valuation—a figure of deductions—which figure must now, however, be put, not against

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total value as in the original case, but against the consideration received on the occasion when increment, if any, arises.

The problem therefore now is to get at the amount of those deductions from total value which are made for the purpose of arriving at assessable site value. Now those are set forth. They are in five different categories, (*a*) to (*e*) of s. 25, sub-s. 4, but only the first two of these categories emerge in this case. As to one, namely (*b*), it is not disputed that to get at the assessable site value you must take in this case that part thereof which was attributed to expenditure of a capital nature—works like roads, drainage, &c.—and that figure is 90*l.* That would have been clearly a deduction from total value in the original valuation. The next, namely (*a*), is set out in these terms: "The same amount as is to be taken for the purpose of arriving at full site value from gross value."

These respective values are set out in s. 25, which I may call the glossary section, and which this House discussed in the case of *Commissioners of Inland Revenue* v. *Herbert*. (1) The gross value is the open market value free from incumbrances. The full site value is that same open market value less incumbrances after deducting buildings, structures, timber, and what might be called visible permanent improvements: deducting these from the gross value, you come at the full site value of the land. The total value is the gross value, subject to the deduction of fixed charges, as in this case the tithe rent-charge.

On the occasion of the valuation of this property as at April, 1909, the gross value was set down at 658*l.*, and the tithe rent-charge being 33*l.*, the total value was set down, as already mentioned, at 625*l.* From that total value of 625*l.* there had to be deducted the same amount as is to be deducted for the purpose of arriving at full site value from gross value, that is to say, the amount reckoned as for buildings and improvements. That was 430*l.*, which, with the 90*l.* for works like roads, &c., made 520*l.*, and this taken from the total value of 625*l.* left the figure of 105*l.* The assessable site value accordingly entered the Domesday Book as at that figure.

My Lords, the report made by the referee in this case shews

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clearly that in his judgment the total value and the value of the things which form deductions from that, namely, buildings and improvements, in order to arrive at site value, remain the same. If, therefore, on the allegation of increment, the statute had ordained that in order to ascertain increment value you had simply, as in the original case, to make your deductions of buildings, &c., from the total value, the case would be at an end. But, my Lords, the statute has not done that, but has done something, in my opinion, very plainly different. It has said in effect this: The buildings and improvements in the original valuation were to be reckoned as deductions from total value in order to ascertain assessable site value; but this occasion, namely, value ascertainment, is a different occasion, and upon it you are to make the like deductions from the consideration actually received for the transfer of the fee simple. When you make the like deductions from that consideration, then that is what "the site value of the land on the occasion on which increment value is to be collected shall be taken to be." So that, my Lords, the deductions, their value not having changed, as is certiorated by the referee, namely, 430*l.* plus 90*l.*, that is, 520*l.* in all—these same deductions, amounting to 520*l.*, are made on this occasion, not off total value, but, under the express command of the statute, off the actual consideration received, that is to say, not off 625*l.*, but off 750*l.* For my own part, I do not have any hesitation in agreeing with the conclusion reached by Horridge J. and the majority of the Court of Appeal.

My Lords, it would be easy to comment upon the fact that the consideration in the present case being in excess of what, in the referee's opinion, was the actual value, there is no affirmance that the site value has risen. There is not, my Lords, nor is there any affirmance that the buildings or improvements value has risen. There is, in short, no affirmance as to the cause of the rise, but the consideration is nevertheless perfectly real, and it is that real, non-speculative, actual thing which the statute says you must begin by taking into account as the full site value, subject to the deductions made as on the valuation occasion or as I have set out. The statute seems to say, There is the windfall. If it is established that the increment arises by an increased

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value in buildings and improvements, then by no means let those be taxed, because the statute is imperative that these must be treated as deductions from any sum which is to be the basis upon which taxation is laid. Buildings and improvements are to escape increment duty. No taxation of that kind is to be laid upon them. But when it is not established that there is any increase in the value of those buildings and improvements, or therefore any increase in the amount of the deductions which are to be made, let these deductions stand. They are unchanged in value. But let the sum from which they are made be the amount received by the fortunate vendor, and let the increment value—it being, however derived, increment value to him—be subject to his contribution to the taxation. Or, in the words of the Act, "Site value . . . . on the occasion . . . . shall be taken to be . . . . the value of the consideration for the transfer." It is indeed a remarkable fact that the opposite construction in fact obliterates these words altogether. According to that view difference of consideration made no difference to site value. If the consideration, the price received, had been tenfold greater, and the improvements had remained the same, then no difference would have happened to the site value, and the words, that the site value is to be deemed to be the value of the consideration, are emptied of meaning.

That the consideration received should neither be expunged nor rendered meaningless, other provisions of the Act make clear. The property in the first place is franked, so to speak, in respect of the increment, the site value being taken as the consideration subject to the deductions on the principle mentioned, and being raised accordingly so as to prevent subsequent increment being reckoned except upon that raised datum. And, my Lords, what appears to me to be a commanding consideration in the construction of this statute is the case of the transfer on the sale of the fee simple of, or interest in, land any time within twenty years before the date when the statute came into effect, namely, April 30, 1909. This period is extended by the Revenue Act of 1911 under circumstances which need not be referred to. But it is important to look to the main provision of s. 2, sub-s. 3, of the Act of 1910 so as to see how carefully the interest of the

taxpayer was guarded under the twenty years' provision. During that twenty years a late owner may have bought upon the crest and sold in the trough of the wave, and when the Act passed, his successor, who had bought in the low market, might hold the subject. Thereafter he sells in a rising market, but the level of the old crest of the wave is not reached.

He is permitted in these circumstances the exercise of an option enacted for the purpose of conferring upon him a favour and a benefit, to point back to the old, and contrast it with the present consideration; the statute treats these as good indications both of the crest and the trough. I must decline to read all value out of this favour given to the taxpayer, by saying that a comparison of considerations means nothing at all. For in such a case, my Lords, the statute is very far indeed from reckoning difference of consideration or price as of no account; it expressly enacts in s. 2, sub-s. 3, that "site value shall be estimated for the purposes of this provision of reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such a transfer after the passing of this Act." In these circumstances, speaking for myself, I do not feel free, but feel forbidden to displace or discard the actual consideration or price as a vital and controlling element in site value.

I agree with the conclusion reached by the Courts below and by the noble and learned Viscount on the woolsack.

Lord Moulton. My Lords, this case raises a question of vital importance in the construction of an Act the passing of which marks a great change in the methods of taxation in this country. So far as the matters in dispute in this case are concerned, it was the conclusion of a political and economic agitation of many years' standing in favour of the adoption of a system which was commonly known as the taxation of land values. For the first time practical recognition was given to the principle that in the rise in value of land in civilized countries there is an element which is due to the general progress of the community, and is independent of any labour or expenditure of the owner or his

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predecessors upon the land itself, and that this so-called "unearned increment" forms a proper subject for specific taxation, or, in other words, that it is just that the State should take its share of such increment of the value of land as arises from this cause.

This particular tax was not, however, the only form of taxation of land which was introduced by the Act. Part I. of the Act (which is headed "Duties on Land Values," and which is the only portion of the Act which will be referred to by me on this occasion, inasmuch as the other divisions of the Act relate to wholly different forms of taxation) imposes also three other novel taxes upon land. The first of these, entitled "Reversion Duty," is a tax of 10 per cent. on the value of the benefit accruing to the lessor by reason of the determination of any lease. The second, entitled "Undeveloped Land Duty," is an annual tax at the rate of $\frac{1}{2}d.$ in the pound in respect of the site value of undeveloped land. The third, entitled "Mineral Rights Duty," is a tax of 1*s.* in the pound of the rental value of all rights to work minerals and of all mineral wayleaves.

In each of these cases there are careful and elaborate provisions for defining precisely the subject-matter of the taxation, and making allowances and adjustments, so as to bring the tax more fully in accordance with the fundamental ideas which plainly underlie the various departments of the new scheme of land taxation. But so far as a close and attentive perusal of the Act enables me to form a judgment none of the specific provisions do anything more. None of them indicate any intention to depart from the fundamental principles underlying each of these taxes, nor have they any such effect. They are either of the nature of practical provisions necessary for the purposes of the Act, or concessions to claims for allowances in respect of special circumstances, with the view of making the tax correspond more accurately with the principles upon which it is based.

An Act dealing with such novel forms of taxation must introduce concepts of the elements out of which the value of land is built up which were wholly new so far as legislation was concerned, however familiar they may have been to economists and political writers, and even to the public itself.

To understand the Act properly it is necessary to get a clear idea of these concepts. They are four in number. The first is the "gross value" of land, which signifies the market value of the land taken just as it stands with all buildings, &c., that are upon it and free from all charges or restrictions. The second is the "full site value," which means the market value of the stripped site. The third is the "total value." This signifies the market value of the land with its buildings, &c., in the condition in which it stands but subject to any fixed charges that are upon it (such, for instance, as "feu duties") and any other existing burdens such as public rights of way, &c. All these charges and restrictions which are to be taken into account when arriving at the "total value" of the land are specifically enumerated in the statutory definition, and for the sake of convenience I shall term them the "burdens" on the land. The fourth and last of these concepts is the "assessable site value." It is the "full site value" less the "burdens." In other words it represents the value of the stripped site subject to the existing legal burdens upon the land which would of course be burdens upon the site even if all buildings, &c., were removed.

These are the fundamental conceptions of the Act. But it is necessary to add that in the last case certain specific deductions enumerated in s. 25, sub-s. 4 (*b*), (*c*), (*d*), and (*e*) are prescribed. These deductions do not affect the main concept of "assessable site value" which follows from s. 25, sub-s. 4 (*a*), although they affect its amount. They are of the nature of special allowances to meet cases where special circumstances (such as the construction of roads or other work done on the site itself as contrasted with erections upon it) exist which would render the result of applying the fundamental conception of "assessable site value" in an unmodified form unfair in those particular cases.

I have great sympathy with the difficulties of the draftsman of an Act dealing with matters so new to legislation, and I should be the last to cavil lightly at the form which he has adopted to express his meaning. But it is most unfortunate that instead of expressing these simple concepts in clear and

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simple language he has defined them as the results of arithmetical operations with which they have no necessary connection and has thus given a wholly false appearance to their mutual relationships.

For instance, the "full site value of land" is defined as the amount which remains after deducting from the "gross value" the difference between the gross value and the value of what I have called the "stripped site." This amounts to nothing more nor less than saying that it is the value of the stripped site. It is thus made to appear to be dependent on and to be derived from the "gross value," whereas it is quite independent of it. If from any chosen sum of money I deduct the difference between that sum of money and 100*l.*, the result must necessarily be 100*l.* whatever be the sum chosen. I have entirely failed to find any explanation of the adoption of this complicated and misleading manner of expressing these simple ideas. It has been suggested that it was for drafting reasons, but on closer examination I can see no ground for thinking that it presents any advantages from that point of view. Yet the draftsman has adopted it not only in this but in other cases. Thus the "total value" of land is defined as the difference between the gross value and the gross value less the value subject to burdens, which is the same as saying that it is the value subject to burdens. Similarly the "assessable site value" (apart from the specific deductions to which I have referred) is defined as the difference between two things, each of which is apparently dependent on the "gross value" of the land. Yet when one looks more closely into the matter it is found that the "assessable site value" depends in no way on "gross value," but is simply the full site value with the burdens thrown upon it as was decided by this House in the *Herbert Case.* (1) But although this peculiarity in the form of the definitions has the effect of rendering it more difficult to construe the Act it does not leave any room for doubt as to the true meanings of the several definitions. They are as given above. These meanings are the direct arithmetical consequences of the verbal definitions appearing in the Act, and they and

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the concepts to which they relate and to which these special names have been given in the Act must be borne in mind in dealing with the provisions of the Act if we would avoid becoming confused by the inexplicable form of the drafting.

I now turn to s. 1, which imposes the increment value duty. It levies a duty of 20 per cent. on the "increment value" of any land and enacts that this duty shall be collected by instalments on certain occasions. Those occasions are respectively (*a*) when there is a transfer of interest by sale or lease, (*b*) when there is a transfer of interest on death, (*c*) at certain periodical occasions. This last method only applies to cases where the land is held by a corporate or unincorporate body or in such a manner that it is not liable to death duties. The instalment of the "increment duty" to be paid in the case of the transfer of the fee simple of the land, or on one of the periodical occasions above referred to, is the full duty of one-fifth of the then increment value less so much as has already been paid. In cases of transfer of interest only (not amounting to the transfer of the whole fee simple) the instalment is a suitable proportion of such one-fifth of the total increment value, such proportion to be fixed by the Commissioners. The conception of the Act, therefore, is that as the site value of the land rises the State becomes entitled to one-fifth of the increment, but that it only ascertains and collects that which is thus due to it on occasions when there has been an ascertainment of the value of the land either by actual sale or leasing of the land or by a valuation of the land for revenue purposes by reason of death;—unless the tenure of the land is such that these occasions will very rarely or never happen. In these last cases it collects the instalments at fixed intervals of fifteen years.

I shall not stop to examine the provisions of s. 2, which deals particularly with the ascertainment of the site value on the occasions when duty is to be collected, except to say that it appears to me fully to carry out the above idea. The only novel feature in the method adopted in s. 2 (as I understand it) is that in cases where an ascertainment of value has taken place of an independent kind without recourse to the machinery of the Act the value thus ascertained is taken as the datum from which

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the calculations of the increment value and therefore of the duty are made.

To my mind, therefore, this part of the Act has a clear and distinct object ascertainable from the language of the Act itself which carries into effect a special form of taxation well recognized at the time and marked by distinct incidents inseparable from it. It could not be better described than in the language of the Minister in charge of the Bill when introducing it: "The valuations upon the difference between which the tax will be chargeable will be the valuations of the land itself—apart from buildings and other improvements; and of this difference—the strictly unearned increment—we propose to take one-fifth or 20 per cent. for the State."

I quote these words not because they have any title to be used in the construction of the statute as it stands, but because they express in such clear and simple language the aim and object of the Act. For the purposes of judicial decision the aim and object of the Act and the machinery for effecting them must be ascertained from the language of the Act itself. But to my mind this House has already declared that the Act does in fact carry out the object of its authors as above expressed, and I shall proceed to make good this proposition before subjecting to an independent examination the language of the special provisions with which we are concerned in this case.

In the case of *Inland Revenue Commissioners* v. *Herbert* (1) the Act was subjected to examination in this House in order to determine whether it was consistent with the scheme of the Act that a recorded "assessable site value" should be a minus quantity. This House by its unanimous judgment decided that it was quite consistent with the object and provisions of the Act that recorded assessable site values should be minus quantities because the tax was based, not on the actual value of the site value, but on its increment, and that there was no difficulty in measuring an increment from a datum line that marked a negative quantity. This decision that the tax is a tax on the increment of the site value is to my mind decisive of the present case for reasons that I shall presently give in detail. It is

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therefore desirable to refer with particularity to the judgments of this House in the *Herbert Case* (1) in order to shew how unhesitatingly and emphatically this House read out of the language of the Act that this is its general purport and effect.

The present Lord Chancellor, after frequently referring to the increment value on which the value is to be levied as the difference between the site value when the duty is to be collected and the original site value, says on p. 334: "For the increment value directed to be taxed is, as I have already pointed out, simply the difference between present and past site value, and this difference is as real and easily measured when one of the quantities is minus as when both are plus." And again on p. 338: "The answer to this is that what will be taxed when increment duty is levied will not be the original site value but the increase in site value."

In like manner Lord Atkinson says on p. 340: "The increment in value arising from an increased demand for building land due to an increase in the wealth or numbers of the surrounding or adjacent population, to its progress in trade or manufacture, or to works carried out at the expense of the municipality within the limits of which the lands are situate, and such like things, the unearned increment as it is popularly called, it is alone designed to tax."

Somewhat later he deals with the very case that is now before the House, namely, a sale of the property. He says on p. 344: "The site value of the land should then be taken to be the purchase-money, less the deduction authorized by s. 25, sub-s. 4 (*a*)."

Lord Shaw of Dunfermline, in his judgment, deals mainly with the question of the position of feu duties. But on p. 355, in dealing with increment duty, he says: "When the statute is treating the problem and fact of increment, it is in the position of laying down, to begin with, the mode of settling a datum line, from which in future years and on future occasions the increment shall be reckoned."

And in the opinion delivered by myself (in entire agreement I believe with the views of the other noble Lords), in speaking of

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"assessable site value," I say on p. 359: "In order to see whether there is any absurdity in this being a negative quantity, it is justifiable and even necessary to look to the way in which the 'assessable site value' so arrived at is to be used for the purpose of assessment of taxes. When this is done it will be found that the principal assessment based upon it is that of the increment value duty, and that the amount of this duty does not depend upon the actual amount of the assessable site value, but upon its variations. For such a purpose there is no incongruity in the assessable site value being a negative quantity, because a negative quantity is capable of positive variations just as much as is a positive quantity."

This House, therefore, interpreted the Act as levying the increment duty on the rise in the site value of land. In so doing it was not in any way overlooking or disregarding the fundamental provisions of s. 2 (which is repeatedly referred to in the judgments) as to site value, but was, in my opinion, emphasizing them. Those provisions are that: "The increment value of any land shall be deemed to be the amount, if any, by which the site value of the land on the occasion on which increment value duty is to be collected or ascertained in accordance with this section exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation." I see in these provisions only an intention to carry into effect the interpretation of the Act which was given by this House in *Herbert's Case*. (1) And, in any case, that decision justifies us in viewing with the gravest suspicion, if not in summarily rejecting, any proposed interpretation of the section which would prevent the calculation which it directs being an estimate of the "site value" of the land in any sense of the words, and would make it impossible to apply the word "increment" to the subject of taxation.

We start then with the decision of this House that the Act levies the increment value duty on the rise in the site value of the land. The directions for ascertaining this rise in the site value are given in s. 2, and it is the interpretation of these directions that is in issue in this case. As interpreted by the

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appellant they do in fact give the rise in site value. As interpreted by the respondents they do not. It is between these two interpretations that we have to choose.

To demonstrate that this correctly describes the issue in the present appeal I will indicate briefly the rival contentions of the parties.

The appellant contends that the scheme of the Act is to ascertain the assessable site value on the occasion when the duty is to be levied in the same way as on the original occasion, with the exception that the "total value" (i.e., the actual value of the owner's interest), instead of being determined by a valuation made for the purpose, is determined by the sale price, if the occasion be an actual sale, or by the price at which it appears in the valuation for death duties, in case it is a transfer at death. This is a perfectly reasonable method of determining the site value, and the difference between the value thus found and the original value may rightly be termed the "increment value."

The respondents' contention, on the other hand, is that you must take no heed of the sale price or probate valuation price in your calculations. You must make an independent valuation of the "total value" as before, and you must use that to find what would be the "assessable site value," if it were calculated in the same manner as on the original occasion. No one could complain of this if the result were taken as the new "site value," or as it has been conveniently termed throughout the argument the "occasional site value." It would only be a different way of arriving at the same end, and the difference between the occasional site value thus found and the original site value as recorded might justly be called the "increment" of that value. But the respondents do not take the value thus found as the "occasional site value." They add to it the difference between the sale price and what they estimate to be the "total value" of the whole of the owner's interest in the estate, and they contend that the sum thus arrived at is what the statute means by the "increment value." The figure thus added has admittedly nothing to do with the site value. The consequence is that what they claim to be the "occasional site value" is wholly different in its nature from the "original site value," and is not the same thing

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calculated at a different date. In no intelligible sense is it "site value," and (what is more important) the difference between it and the original site value cannot possibly be termed the "increment" of that value.

I was greatly struck during the argument by the way in which counsel on behalf of the Crown completely disregarded the light thrown on the meaning of the Act by the consistent use of the term "increment" in connection with this duty. The increment of anything is the difference between its value at two different times—it is not the difference between the value of one thing at one time and another and wholly different thing at another time. Thus the difference between the longitude of a ship to-day and the longitude yesterday may fairly be termed the "increment" of that longitude. It may be ascertained to-day by one method, say that of lunar distances, whereas yesterday it was ascertained by another and perhaps easier method, say, solar observations and the chronometer. But so long as these are merely different methods of arriving at the same thing, the difference between the results is justly termed the "increment" of the longitude. But the difference between the latitude of a ship to-day and its longitude yesterday is not the "increment" of anything. By the use, therefore, of the word "increment" throughout the relevant parts of the Act it declares in an unmistakable way that the subject-matter—the assessable site value—is in its nature one and the same throughout, though the precise method of arriving at its value may vary from time to time according to the material for arriving at that value which the circumstances of the moment provide. And this is no case of a term chosen merely for convenience of drafting. On the contrary, the word "increment" goes to the very root of the matter. Both in the nature and the justification of the new system of taxation the idea of "increment"—unearned increment—reigns supreme. How completely the contention of the respondents contradicts the identity of the subject-matter may be seen from the figures of the present case. They admit that no element of value of the land has changed. The gross value, the total value, the full site value, the burdens are all unaltered, and if the assessable site value

had to be calculated now the figure would be identical with the original site value as recorded. And yet they claim that there is an "increment" of 125*l.* on that value, and they seek to tax that "increment."

I have said that the fact that the Act uses the term "increment" to describe the subject of the tax ought to make us reject, or at all events be very slow to accept, an interpretation of the directions for ascertaining site value which would be inconsistent with the natural meaning of the word. But it must not be imagined that the case of the appellant rests solely on this consideration. It is, in my opinion, supported by the language of the Act throughout as well in the provisions which prescribe the calculations which are to be made to ascertain site value as by those other parts of the Act which indicate the nature and status of the site value thus obtained.

To establish that this is the case I shall now proceed to examine the specific directions given in s. 2 for the "ascertainment" of "the site value of the land on the occasion on which increment duty is to be collected," i.e., the "occasional site value." In this examination I shall take, for the sake of simplicity, the case where it is the whole interest, and not merely a part of it, which is being transferred, &c.

It will be remembered that in the definition of "assessable site value" in s. 25 it is represented as being derived from "total value" by making certain deductions. For the purpose of "ascertaining" the "occasional site value" the statute directs that you shall take as that from which deductions are to be made—not the "total value" eo nomine—but (*a*) and (*b*) the amount of the consideration where the occasion is one of an actual sale; (*c*) the amount of the valuation as ascertained for the purposes of the Finance Act, 1894, where the occasion is one of transfer by death; and (*d*) the "total value" ascertained according to s. 25 of the Act where the occasion is one of those "periodical occasions" when the duty levied on corporate or unincorporate bodies holding land, such bodies being viewed by the Act as persons who cannot be expected to sell or transfer the land they hold, and must, therefore, be taxed on stated occasions. From these amounts the "like deductions" are to

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be made as are directed to be made for the purpose of arriving at the site value of land from the total value.

The first thing that strikes one is that the substituted amounts are in each case actual representatives of the "total value," the only difference being that in the first case the total value is arrived at by what an actual sale has shewn it to be, in the second it is arrived at by a valuation of the same subject-matter for the purposes of another statute, and in the third case it is arrived at by a valuation made in the precise way set out in s. 25 of the Act. What then is the meaning of the provision? It means in my eyes that the statute is aiming at the same thing when ascertaining "occasional site value" as when ascertaining "original site value," but that it is availing itself to the full of the special facilities for determining fairly the "total value" which the "occasion" furnishes. If there is a sale it takes the consideration given as being the "total value," if there has been a valuation for revenue purposes which has been duly proved to be correct it takes that as being the "total value," and it is only when there has been neither sale nor independent valuation that it is driven to have recourse to a special valuation of "total value" to aid it in arriving at the site value at the moment.

This third case appears to me to give guidance as to the meaning of these provisions which is of special value. In the cases that come under it the "occasional site value" is arrived at in precisely the same way in all respects as if it were "original site value" calculated at the later date. Now these cases do not differ in any way from the others so far as regards the nature of the property or its being subject to the duty. The holders of the land in the cases that come under (*d*) are neither more nor less meritorious than the holders in the cases previously dealt with, and there is no sign of any intention in the statute to vary the amount or the incidence of the tax in their case, nor would there be any conceivable reason for doing so. The only differentia of the cases that come under (*d*) is that the Legislature is unable to avail itself of help or guidance from independent transactions occurring at the moment of levying the duty. It is thus thrown upon its own resources to ascertain "occasional site value," and

it does so by treating it as the then value of the same thing as appears in the register of original valuations as "original site value." How can we then admit an interpretation of the provisions in cases of sale or death which would make "occasional site value" in those cases mean something radically and in its very nature different from the "original site value" with which it is to be compared and of which its increased amount is to shew the "increment" when we find that the Legislature in this last case, the one in which it is perfectly free to make its choice, treats the two as identical in nature so that their difference is a true "increment"?

The natural construction, therefore, of these provisions of s. 2 is, to my mind, that the total value of the property as shewn by the sale, lease, or valuations made on the occasion (whether those valuations were made specially for the purpose or for the purposes of the Finance Act, 1894) is to be taken as the "total value" for the purpose of the calculations which are to give the "occasional site value" — these calculations being effected in precisely the same way as adopted originally for the purpose of arriving at the "assessable site value" from the "total value." This does no violence to the language of s. 2 and, indeed, it is the natural and obvious meaning of that language. Indeed, I cannot understand how this interpretation can be resisted so soon as it is realized that the Act, by taking in (*d*) the "total value" as obtained under s. 25 as replacing the values which are otherwise obtained in the cases coming under (*a*), (*b*), and (*c*), is impliedly giving to those values the status of "total values" for the purposes of this taxation.

This simple and rational interpretation clears up all the difficulties. The "total value" is obtained directly from the sale, &c. The "gross value" is then obtained by adding to the total value the capitalized value of the "burdens." The "full site value" is to be obtained (as all parties admit) by direct valuation of the stripped site and not by calculation. These values are used precisely as in s. 25, sub-s. 4. In this way the provisions of s. 2 carry out in every way the principle of taxing the "increment" of site value which the House in the *Herbert*

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Case (1) recognized to be its intention, and this interpretation renders the language of the Act so far as it relates to increment duty consistent, and such as could fairly be used for the purpose of describing the taxation it imposed.

I cannot think that the learned judges who have in the Courts below supported the contention of the respondents have appreciated the consequences of their interpretation, and how completely inconsistent it is with the object of the Act and its general tenor. To make this plain I will take the figures of the present case, but for the sake of clearness I will suppose that it was a transfer by death and not by alienation. There is nothing in the Act to make the valuers for probate purposes the same as those for the taxes on land values, and I will take it that it was the valuers for probate (instead of the purchaser) who fixed the value of the whole of the owner's interest in the estate at the actual figure of 750*l.*, which was the consideration of the sale. How would the matter stand on the contention of the respondents which has been supported by the Courts below? It would stand thus. The respondents admit, as they are compelled to do, that the site value has not changed in any way, and that this will be found to be the case whichever valuation you take as correct. But they claim *that the Act entitles them to charge upon the difference of the two valuations of the total estate as being "increment of site value"!*

My Lords, I picture to myself how a catechism on the laws of England would read if this be so. Question: What is the increment of the site value of land when the value of the site has not changed? Answer: It is the difference of opinion of two sets of Government valuers as to the value of the owner's total interest in the estate. Could the force of absurdity go farther? Yet this is no ingeniously framed hypothetical case. It gives the plain arithmetical results of the contention of the Crown applied to the figures of the present and all similar cases, and indeed applies in substance to all cases under the Act. The defect in the method of calculation contended for by the Crown is not that the results are sometimes wrong but that they are never right except by pure accident. My Lords, this Act is no minor or subsidiary Act

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where one might without disrespect to the Legislature imagine that a mistake might be made by haste or inadvertence. It is an Act introducing a novel form of taxation which was in the future to be one of the main sources of the national revenue. It must have received as it undoubtedly merited the closest attention of the Legislature while the Act was passing through it. The object and intention of the Act are clear and have been pronounced to be so by this House, and the point in issue goes to the root of the taxation introduced by it. I cannot bring myself to declare that it has wholly failed to achieve that object or carry out that intention, and further that it has done so in a manner so ludicrous as to make it a laughing-stock to any one who will take the trouble to follow out to its necessary arithmetical consequences the construction which is contended for by the respondents.

Counsel for the Crown defend this construction of s. 2 by saying that it follows exactly the language there used. To my mind it has not even that merit. There is nothing to justify calculating the deductions on the basis of a "total value" different from the figure from which these deductions are to be made, which is clearly the figure taken in the clause, as representing "total value." Indeed the phrase, "the like deductions" (not "the same deductions"), points to allowing for the fact that the circumstances are changed and that the deductions are to be obtained by like processes mutatis mutandis. This agrees precisely with the construction put upon the words by the appellant. But there is the far weightier argument against the suggested construction to which I have already referred and which arises out of the language of the section itself. If it means what is contended for by the Crown, it is not in any sense an "ascertainment" of the "site value" of the land on the occasion. It leads to something wholly different from and independent of the site value—something which may increase when the site value decreases, and vice versa. To shut one's eyes to the expressed object of a clause is a bad preparation for understanding it aright, and between one interpretation which leads to what may rightly and fairly be said to carry out that object, and another which does something irreconcilable therewith, there is no doubt to which preference should be given.

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Let me now turn to the other arguments urged by the counsel on behalf of the Crown in support of their contention. The main one (and in fact the only substantial one) is that if the appellant's contention be taken the "site value" arrived at is independent of the value of the consideration for the sale or the amount of the probate valuation as the case may be. Why then should they be referred to in the section?

This argument—even if it were correct in its facts—defeats itself. For if we look at the method of arriving at occasional site value under (*d*) we find that this very same thing is and must be the case, even on the contention of the Crown. The "total value" there referred to disappears or becomes immaterial in exactly the same way and to the same extent as does the "consideration for the sale" or the "principal value" in cases (*a*), (*b*), and (*c*). In truth the argument tells against the respondents and not in favour of them. The fact that in (*d*) the "total value" referred to becomes immaterial in respect of s. 2, sub-s. 2, would lead us to expect that the figures which in (*a*), (*b*), and (*c*) take its place would become immaterial in a like way and to a like extent. The fact is that this peculiarity arises solely from the topsy-turvyness of the definitions in s. 25, which, as I have said, make it appear as though the figure which represents "total value" affects "assessable site value," whereas in fact it does no such thing.

But the argument is incorrect in fact. The deductions enumerated in s. 25, sub-s. 4 (*b*), (*c*), (*d*), (*e*), which are to be made in arriving at "assessable site value," are expressed as being parts of "total value," and therefore the figure which represents that value may very well affect them. It is only when none of these deductions are made that the amount taken to represent "total value" has no effect on occasional site value, and then it is right and proper that it should not affect it in the calculations under s. 2 in just the same way that it does not affect "assessable site value" in the calculations under s. 25.

This argument, therefore, breaks down entirely. The facts of the case do not support it, and even if they did the supposed absurdity is not got rid of by the contention of the Crown. Moreover, as I have said, this so-called absurdity is only one in form

due to the peculiar shape of the definitions in s. 25 and not to their substance. To put it plainly, the drafting of this part of the Act is such that it is not enough to look at the words alone; you must remember what they denote and must keep present to the mind an intelligent conception of the meaning of those words and their relation to the main principles of the Act if a correct construction is to be arrived at. A striking example of this is to be found in this very section. In sub-s. 2 (*a*) and (*b*) reference is made to the "fee simple" of the land, and under (*b*) it is the "value of the fee simple" which is to be taken as the figure from which the deductions are made. The natural meaning of the term would be the whole "fee simple" of the land, and this is the meaning of the phrase in s. 25. To give it this signification is quite possible arithmetically, but its consequence would be not only unjust but ludicrous. It would make a man who sells his land pay increment value duty in respect of the capitalized value of the whole of the burdens that exist on that land (and which he does not own) as if they were increments of site value. How is it then that in construing the section one is saved from such a blunder? It is solely because one sees that the value of the "fee simple" is about to take the place of and be treated as the "total value," which is, of course, the value of the burdened fee simple. The section, therefore, leads to absurd consequences unless you realize that there is an intention to make the figures spoken of in (*a*) and (*b*) play the part of "total value," and allow yourself to be guided thereby, and that is all that is needed to support the appellant's contention.

But apart from all direct consideration of the precise language of s. 2, there is a further argument based upon a consideration of the whole of this part of the Act which to my mind forces us to reject the contention of the counsel for the Crown. They would have us construe the language of s. 2 as meaning that "occasional site value" is not a site value at all or alike in its nature to "assessable site value," but, on the contrary, is a figure arrived at by a prescribed method solely for the purposes of taxation and not representing any element of land value. That is not the lesson taught us by the Act itself. It loyally and

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consistently treats occasional site value arrived at under s. 2 as being the equivalent of and as being capable of taking the place of assessable site value and as differing from it not in nature but only in date.

The most striking example of this is to be found in s. 2, sub-s. 3. It is there provided that if it can be shewn that the site value of the land at the time of any transfer within twenty years before the Act exceeded the original site value as ascertained under the Act that site value shall be substituted for the original site value for the purposes of increment value duty. The site value at the earlier date is to be arrived at according to the provisions of s. 2, sub-s. 2, i.e., is to be based on the actualities of the transfer.

Is it possible to conceive that the Legislature would take as an "original site value" a figure that has nothing to do with the value of the site? This Act lays the burden of the increment value duty on all landowners. It taxes the increment of site value. Is it possible that in measuring the increment one landowner should be allowed to start from a figure having no reference to actual site value while others have to start from its actual value? There is no injustice in allowing site value to be arrived at by a more accurate method—one depending more directly on actualities—where the materials for such a process exist, and yet leaving it to be determined solely by valuation where those materials are not at hand. But there is injustice in taxing one man according to the site value of his land and another according to a figure which does not represent that value and has no necessary connection with it, the two cases being distinguished by nothing in the nature or circumstances of the holding, but by the accidental circumstance of a sale having or not having taken place within twenty years.

Let me give another example of the manner in which the Act testifies by its treatment of occasional site value to its being of the same nature as assessable site value and differing from it only in date. In s. 2, sub-s. 5, we find provisions for granting a certain allowance on the collection of increment value duty. On the first occasion there is to be remitted an amount equal to 10 per cent. of the original site value of the land and on any

subsequent occasion an amount equal to 10 per cent. of the site value on the last preceding occasion on which duty was collected. This must, of course, be an "occasional site value" calculated according to the procedure of s. 2, sub-s. 2. It is clear, therefore, that occasional site value is regarded as representing and taking the place of original site value for the substantial purpose of measuring the remission of taxation to be made. Is it conceivable that this should be done if it was a figure that had nothing to do with site value? This reinforces the remarks that I have made as to the provisions of s. 2, sub-s. 4, which permits landowners to require that the "occasional site value" at a past date should be inserted as the "original site value" in the record. The remission on the first occasion for those who come under it would be 10 per cent. of a figure having no reference to the site value of their land, but greater than it, while their brother taxpayers would only have a remission which is based on the true site value.

Other cases could be given, but they may be all summed up in saying that whenever occasional site value is referred to in the Act, it is treated as though it represented assessable site value in its nature and status—in short that it was in its nature the assessable site value of the later date, although arrived at in certain cases by the use of special material then available.

Let me now turn for a moment to the general aspects of this case. Even assuming that the contention of the Crown were correct as to the literal construction of the language of s. 2, it would only mean that this suit is brought to establish that a draftsman's error (which must have become obvious as soon as any one began to administer the Act) is irremediable except by fresh legislation. It is clear that the contention of the Crown does not represent the true intention of the Legislature. Let me give an example of its meaning in quite an ordinary case. Suppose that while the site value of certain land has remained unchanged, the buildings thereon have fallen in value either from age, or unsuitability, or any other cause. The estate is sold, say, for 300*l.* less than its original recorded value. The Government valuer thinks that its value has in reality fallen more than this, say 500*l.* On the interpretation contended for

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by the Crown, the owner would have to pay on the 200*l.*, the difference between these figures, as increment of the site value although these figures have nothing to do with the site value (which is unchanged), and, alas! have nothing to do with "increment" because it is a case of a diminishing estate. No one can for one moment imagine that any Legislature could have consciously enacted such utter nonsense, or that any responsible Minister could have proposed it. It must be purely a draftsman's error. He has not made his language clear enough to prevent its being supposed to have the absurd signification in question. In such a case, my Lords, ought we not to give great weight to the principle that a statute should be construed as a whole? The Legislature is more capable of seeing that its true aim is expressed by the general tenor of an Act than of criticizing minute details of drafting. Surely we ought in this case to reject an interpretation of what I may term a machinery section which is inconsistent with the admitted aim and tenor of the Act, especially when we have at hand an interpretation entirely consistent with it, and which, at any rate, is so far a possible interpretation, that until the hearing of this appeal it never occurred to me as possible that any one would understand it in any other sense.

The whole Act, therefore, in my opinion, pronounces against an interpretation of s. 2 which would make occasional site value a meaningless abstraction having no connection with site value. What is there to put against this? Though one may not take into consideration that it would be directly contrary to the declaration of the Minister in introducing the Bill, it is permissible to say that one must have lived outside the ordinary life of educated people in England to suppose that any Government or any Legislature could have called such a tax a tax on the increment of the site value of land. Moreover there is no conceivable reason for such an absurd system being adopted. It is impossible even to say that it produces more or less revenue than would be produced by that for which the appellant contends. It only ensures that the revenue is collected in such a way that it cannot be, or be honestly called, a tax on the increment of site values. And after long and careful consideration of the Act I am convinced that

the interpretation contended for by the respondents cannot be defended as being in accordance with the true construction of the Act. If read as a whole the Act, to my mind, clearly means that for which the appellant contends. The same is true if s. 2 be read as a whole. And even if we were to put ourselves into blinkers and shut out all but a small portion of s. 2 and construe it by itself, we could only arrive at the construction contended for by the respondents by forcing the language of the section and ignoring the fact that it is only the "like" deductions and not the "same" deductions that are to be made. To calculate deductions on one value of "total value" and then to apply those deductions to another and a different value is not to make the "like" deductions to those made in a process the correctness of which essentially depends on taking one and the same value of "total value" throughout the process. I see therefore nothing which requires me to hold that this section bears a meaning which would render misleading the clear and repeated professions of the Act that the duty it imposes is a tax on the increment of site value, and I am of opinion that the appellant is right in his construction of the section and that this appeal should be allowed.

LORD PARMOOR. My Lords, I regret not to be able to concur with the noble Viscount on the woolsack on a question which in my opinion simply involves the construction of the Finance Act of 1910.

My Lords, this is an appeal which raises the question whether the appellant is liable to pay increment value duty upon the occasion of the sale by him of the dwelling-house and shop known as No. 32, Lansdowne Road, Forest Hall, Northumberland.

The sale was of the fee simple of the land, and the consideration paid was 750*l.* The land was subject to a tithe rent-charge of the capitalized value of 33*l.* The full site value was estimated at 228*l.*, and there was an agreed sum of 90*l.* in respect of works executed, to be deducted before arriving at the assessable site value on the occasion. The referee adopted the contention of the appellant that "the fee simple was sold, subject to tithe of 33*l.* capital value, for 750*l.*, therefore the gross value which in this case is the fee simple value free from tithe (see s. 25 (i.))

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is 783*l.*" (paragraph 8 (*a*) (1.) of the special case). He further found that at the time of the sale the fee simple of the property if sold in the open market by a willing seller in its then condition free from incumbrances and from any burden, charge, or restraint, other than rates or taxes, might have been expected to realize the sum of 658*l.* Neither of these findings of the referee is in any way conclusive of the question to be decided, which is the construction of the Finance Act, in order to ascertain in what sense the Legislature has used the words "gross value" in their application to the calculation of an occasional site value, to be ascertained in accordance with s. 2 of the Act, when there has been a transfer on sale of the fee simple of the land.

In coming to a conclusion on this point the ordinary principles of construction must be followed. A statute is the expression of the will of the Legislature, and it is the duty of the Courts to give effect to the language in which the will of the Legislature has been expressed. It is not the function of Courts of law to entertain questions of policy, and I am unable to give any weight to arguments based on the consideration whether a particular interpretation is more favourable to the Crown or to the subject. In all cases, ordinary words must be interpreted in their natural sense, and technical words in the sense which they have acquired, having regard to the context in which they are found and to the principle that every section of a statute should, so far as possible, be construed to make a consistent enactment of the whole. As a key to arrive at the interpretation of language used in a statute it is permissible, and may be necessary, to get a conception of the aim and object of the whole statute, since in this way an interpreter of the statute places himself in the position of those who used the language which he is called upon to interpret, but care must be taken that this is done not to make law, but only to expound it. In the present case the statute appears to me to have been drafted with perfect consistency. Its aim in the sections under review is to impose duties on land values and to direct the methods of valuation. The language to be interpreted is not, in my opinion, difficult if the context in which it is found is fairly considered.

Sect. 1 of the Act simply denotes the occasions on which the

increment value duty may arise and the rate at which it should be collected. I think it is clear that increment value duty denotes a duty on the increment in value between the same thing calculated at different dates. Sect. 2 contains a definition of the increment value of any land, and the present case largely depends on its proper construction. The increment value of any land is to be deemed to be the amount, if any, by which the site value of the land on the occasion on which increment value duty is to be collected, as ascertained in accordance with this section, exceeds the original site value of the land, as ascertained in accordance with the general provisions of this part of this Act as to valuation. The contrast between ascertaining site value in accordance with s. 2, and ascertaining site value in accordance with the general provisions of this part of this Act, is essential, and must be followed through the whole process to prevent confusion and inconsistency. The care of the draftsman to avoid such confusion and inconsistency is further illustrated in the last paragraph of s. 25, sub-s. 4. In each case the words "site value" denote the assessable site value of the land and may be referred to respectively as the occasional site value and the original site value. To ascertain the occasional site value of land, full directions are contained in s. 2, sub-s. 2. Where, as in the present case, the occasion is a transfer on sale of the fee simple of the land, the calculation starts from the value of the consideration for the transfer, in this case the sum of 750*l*. Where the occasion is a grant of a lease, or the transfer on sale of any interest in the land, the value of the fee simple of the land is to be calculated on the basis of the value of the consideration for the grant of the lease, or the transfer of the interest. In other words, a capitalized figure is to be ascertained from the actual transaction on the occasion on which increment value duty is due. Where the occasion is the death of any person, and the fee simple of land is property passing on that death, the principal value of the land as ascertained for the purpose of Part I. of the Finance Act, 1894, and where any interest in the land is property passing on that death, the value of the fee simple of the land calculated on the basis of the principal value of the interest as so ascertained, become the initial figure in the calculation.

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Lastly, where the occasion is a periodical occasion, and there is no transaction on which the occasional site value of land can be based, then the total value of the land on the occasion falls to be estimated in accordance with the general provisions of this part of the Act as to valuation. It is noticeable that where the method of ascertainment of value is to be in accordance, not with s. 2, but with the general provisions of the Act as to valuation, this is provided for in express terms. The phrase "total value" is here introduced for the first time, and to ascertain its meaning it is necessary to turn to s. 25. In s. 25, sub-s. 3, the total value of land is defined to mean the gross value, after deducting the amount by which the gross value would be diminished if the land were sold subject to any of the fixed charges, burdens, or restrictions specified in the sub-section. In the present case the only fixed charge is the tithe rent-charge of the capitalized value of 33*l.*, so that the total value under s. 25 would be ascertained by deducting 33*l.* from the gross value. In sub-s. 1 of the same section the gross value of land is the fee simple value of the land in its then condition, free from incumbrances, and from any burden, charge, or restriction other than rates and taxes, and this value as ascertained under s. 25 means the amount which the fee simple value of the land if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and burdens, might be expected to realize. It is argued that in calculating the gross value under s. 2 the method of ascertainment in s. 25 must be followed, but in my opinion this is a fallacy and inconsistent with the statutory directions.

Turning back to sub-s. 2 of s. 2, it is evident that total value and the value of the consideration for the transfer of the fee simple of land denote the same thing, namely, the value of the land subject to the incumbrances which the vendor does not sell and the purchaser does not buy. This substantial identity is not affected because the method of ascertainment differs where there has been an actual sale. The only incumbrance in this case is the tithe rent-charge, capitalized at 33*l.*, which is not included in the sale

price and is excluded from total value. I agree that it is nowhere said that for the purpose of ascertaining the occasional site value of land the value of the consideration for the transfer shall be substituted for total value, but in my opinion such a direction would be wrong in principle and calculated to lead to confusion. Total value in s. 25 is a deduction from estimate; consideration for the transfer denotes an actual figure, and this is a vital distinction. The important factor is that, in a section dealing with valuation, consideration for transfer and total value are treated as equivalent factors in arriving at the site value of land. Such a direction is in accordance with the recognized principles of valuation. Sect. 2 accordingly enacts that when the value of the consideration for the transfer has been ascertained, it is subject to the like deductions as are made in the general provisions of this part of the Act as to valuation for the purpose of arriving at the site value of land from the total value. These deductions are specified in s. 25, sub-s. 4. The first of them (*a*) is the same amount as is to be deducted for the purpose of arriving at full site value from gross value. No such deduction is made, since full site value is ascertained by valuation, but the meaning is clear, that, whatever amount denotes the difference between full site value and gross value, the same amount is to be deducted. There is no difficulty in the meaning of full site value. It means the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realize if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, and other things growing thereon. In the present case this value has been estimated on the occasion of the sale at the sum of 228*l*.

The remaining factor to determine is gross value. This is the real test in the case to which the main argument on both sides was directed. It was argued on behalf of the Crown that gross value in s. 2 means an amount ascertained by valuation under s. 25, sub-s. 1, and that in this case the referee has found that amount to be 658*l*. The fallacy of this contention arises

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in a confusion between the interest to be valued and the method of valuation to be applied.

The gross value of land in s. 25, sub-s. 1, is the value of the fee simple of land free from incumbrances or from any burden, charge, or restriction other than rates or taxes. This language is unambiguous, whether regarded in reference to the ordinary meaning of the words or as introducing a technical definition. Where there has been no actual transaction, the only way of ascertaining the amount of gross value is by valuation, and in s. 25, sub-s. 1, the method of valuation is to estimate the amount which the land might be expected to realize if sold at the time in its then condition in the open market by a willing seller. The appellant does not deny that the gross value of land in s. 2 means the value of the fee simple of land free from incumbrances and from any burden, charge, or restriction other than rates or taxes, and frames his case on the application of this definition. What the appellant does say is that the contention of the Crown, that the method of ascertaining the gross value in s. 25 should be applied in s. 2, is not in accord with the directions of s. 2, and leads to the confusion and inconsistency which these directions are intended to avoid. The result in the present case would lead, not to the actual fee simple value of the land free from incumbrances and burdens in its condition at the date of the sale, but to a figure based on a hypothetical estimate proved by experience to be wrong and inaccurate. If the consideration of the transfer on the sale of the fee simple of the land is 750*l.*, and there are incumbrances in the nature of tithe rent-charge to the capitalized value of 33*l.*, then the gross value according to the definition in s. 25, as ascertained under s. 2, is 783*l.* I not only do not find that the statute compels the substitution of 658*l.*, but in my opinion it carefully provides against such an absurd conclusion as would result in giving a lower figure for gross value than the consideration on transfer in respect of the same property on the occasion of a sale.

The occasional site value of the land ascertained in accordance with the contention of the Crown includes an element of builders profits, and in other cases might introduce elements wholly independent of the actual site value of the land. On the other

hand, the contention of the appellant does eliminate the site value of the land from other elements of value. I have already referred to the paragraph which occurs at the end of s. 25, sub-s. 4, which excludes from site value, deemed to be assessable site value of the land as ascertained in accordance with this section, the site value of land on an occasion on which increment duty is to be collected. In my opinion the crucial words in this paragraph are "as ascertained in accordance with this section," and the paragraph recognizes that the ascertainment of site value in s. 2 proceeds throughout on the method therein directed. There is an inevitable difference in method when a datum line founded on an actual transaction is contrasted with one founded merely on estimate.

The words "like deductions" in s. 2 in no way conflict with the above construction. I understand the word "like" to mean deductions of an equivalent or corresponding character, and not merely deductions of the same amount. The amount of the deduction is the difference between full site value and gross value, and in order that like deductions may be made, it is necessary to ascertain the figures for gross value and full site value in accordance with s. 2, and to apply the difference in the calculation. I cannot agree with the view that this problem can be answered by saying that no gross value need be fixed, since a similar result may be obtained by the simple deduction of the two sums of 33*l.* and 90*l.* from the full site value. It is only by ascertaining gross value in s. 2 that it is possible to apply the principle of like deductions in accordance with the directions of the Act. It follows, in my opinion, that the referee came to a sound conclusion in accordance with the proper construction of the relevant sections of the Act, without reference to considerations of policy, which are wholly irrelevant.

It was argued against this construction, on behalf of the Crown, that there is no direction to obtain gross value by the addition of two figures. In my opinion no such direction is required. If the gross value of land in s. 2 is the fee simple value of the land free from incumbrances, and from any burden, charge, or restriction, then the amount is accurately ascertained by the addition of the sum of 33*l.* to the sum of 750*l.*, and the referee properly

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regarded it as immaterial whether the arithmetical process is one of addition or subtraction. The important factor is the datum line from which the calculation starts, and the Act provides that, on the occasion of the sale of land in fee simple, the datum line shall be the consideration for transfer.

It was further argued on behalf of the Crown that the contention of the appellant would result in the same site value whatever the consideration for transfer might be. I am not prepared to assent to this proposition in respect of deductions to be made under s. 25, sub-s. 4 (*b*), (*c*), (*d*); but whether true or not, it does not appear to me to be material. The same argument is applicable in whatever way the gross value is ascertained so long as one form of calculation is consistently applied. This is evident in the present case, where the sums of 33*l.* and 90*l.* might be deducted from the full site value without any reference to gross value, but this is not the method directed in the Act, and I think that gross value should be ascertained and applied, whether under s. 2, or s. 25.

The attention of the House was directed in the argument both on behalf of the appellant and of the respondents to sub-s. 3 of s. 2. This section refers to what has been called substituted site value; that is to say, a site value to be substituted for the original site value under certain conditions for the purposes of increment value duty. The conditions arise where it is proved to the Commissioners on an application made within due time that the site value of any land at the time of any transfer on sale within a certain period exceeds the original site value of the land as ascertained under the Act. The provision is also applied to the case of a mortgage. In such a case the site value is to be estimated by reference to the consideration given on the transfer in the same manner as it is estimated by reference to the consideration given on a transfer where increment value duty is to be collected on the occasion of such transfer.

If the argument on behalf of the Crown is accepted, the substituted site value would not be the same thing as the original site value for which it is substituted, but might include, and would include in such an instance as the present, an element of builders' profits, in addition to the stripped value of the land.

It is satisfactory to find that the language of the Act does not lead to such an anomaly, and that the drafting of the Act is not open to this criticism.

My Lords, the attention of the House was further directed to a number of sections which appear to indicate that site value is consistently applied to the value of land, and not to the value of land with an addition of other elements, such as builders' profits. Should these sections come to be interpreted in this House, further consideration may be necessary, and I desire to express no opinion. Sect. 3 of the Act is, however, directly in point. It contains general provisions as to the collection of increment value duty. In each of the sub-sections the subject to be taxed for increment value duty is limited to the increment value of land, and in sub-s. 5 a reduction is allowed on the first occasion for the alteration of increment duty of an amount equal to 10 per cent. of the original site value of the land, and on subsequent occasions to an amount equal to 10 per cent. of the site value on the last preceding occasion. It appears to me that this provision necessarily implies that site value means the same thing on the successive occasions, and that it is only on this basis that the whole scheme of the Act is consistent.

My Lords, the result of the method adopted by the referee, and which, in my opinion, is accurate, is to find the site value on the occasion of the sale in fee simple at 105*l.* It is not until this amount has been fixed that the original site value should be referred to, since the two figures fall to be compared in order to ascertain whether there has been an increment value of land on which an increment value duty is payable. The original site value is 105*l.*, so that in this case there is no increment value of land and no increment value duty is chargeable.

My Lords, in my opinion, the appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, July 20, 1914.

Solicitors for appellant: *Robinson & Bradley, for Lundi, Shortt & Fenwicke, Newcastle-upon-Tyne.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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NOCTON . . . . . APPELLANT;

AND

LORD ASHBURTON. . . . . RESPONDENT.

ET E CONTRA.

Solicitor and Client—Claim for Indemnity—Misrepresentation — Improper Advice—Fraud—Negligence—Breach of Fiduciary Obligation—Pleading—Cause of Action.

Per Viscount Haldane L.C.: *Derry* v. *Peek* (1889) 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties.

A mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The statement of claim alleged that the defendant, when he gave the advice, well knew that the security would be thereby rendered insufficient and that the advice was not given in good faith, but in the defendant's own interest.

Neville J. found that the charge of fraud was not proved and dismissed the action. The Court of Appeal reversed this finding and granted relief on the footing of fraud:—

Held, (1.) that in the circumstances the Court of Appeal was not justified in reversing the finding of fact of the judge of first instance; but (2.) that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing.

Decision of the Court of Appeal affirmed on different grounds.

APPEAL and cross-appeal from an order of the Court of Appeal reversing a judgment of Neville J. in an action brought in the

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

Chancery Division by Lord Ashburton, the respondent in the original appeal, against Nocton, the appellant in the original appeal, and others.

Nocton practised as a solicitor first as a member of the firm of Broughton, Nocton & Broughton and afterwards, on the dissolution of the firm in 1905, on his own account.

Lord Ashburton, who succeeded to the barony in 1889, being then twenty-three years of age, employed Broughton, Nocton & Broughton, who were the family solicitors, as his solicitors, Nocton being the particular member of the firm who had the conduct of his business, and on the dissolution of the firm he employed Nocton until November, 1910, when he withdrew his retainer. He had consulted Nocton in various financial transactions and until shortly before the withdrawal of his retainer he reposed implicit confidence in his judgment and integrity.

By the action Lord Ashburton claimed, in effect, to be indemnified by Nocton in respect of a mortgage dated September 26, 1904, and, incidentally, in respect of a release of part of the mortgage security dated December 28, 1905, upon the ground that he had been induced to enter into both these transactions by the improper advice of Nocton; and the action was founded upon fraud.

On January 15, 1903, the Honourable Alexander Baring, who was a brother of Lord Ashburton, agreed to purchase certain freehold property in Church Street, Kensington, at the price of 60,000*l.* with a view to developing it as a building estate. The contract was entered into by Baring on behalf of himself and Nocton and on the terms that all profit and loss in connection with the purchase should be divided between them in equal shares. The purchase was completed on June 24, 1903, and the purchase-money was provided by Parr's Bank and was secured by a mortgage of the purchased property and of certain other property belonging to Baring.

Lord Ashburton had been invited by Nocton to join in this purchase, but had declined this invitation.

On February 10, 1904, Baring agreed to sell the Church Street property to Thomas Holloway and John Douglas, who were speculating builders, for 80,000*l.*, but the agreement was conditional upon

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(1.) the purchasers obtaining a loan of 60,000*l.* at 4 per cent. upon the security of the property; (2.) the vendor lending to the purchasers 20,000*l.* upon a second mortgage of the property with interest at 5 per cent.; (3.) the purchasers obtaining from the vendor or other persons a loan, subject to the previous loans, of 47,500*l.* at 6 per cent., as to 40,000*l.* for the purpose of erecting flats, shops, and buildings upon the land, and as to 7500*l.* for the purpose of paying solicitors' and other incidental costs and interest upon the loans during construction.

By a supplemental agreement dated June 15, 1904, the loan of 60,000*l.* was increased to 65,000*l.* and the interest increased from 4 to 5 per cent. and the loan of 20,000*l.* was reduced to 15,000*l.*

In the meantime Nocton by a letter dated May 3, 1904, proposed to Lord Ashburton that he should advance to Douglas and Holloway the sum of 65,000*l.* The letter was in the following terms :—

"Dear Lord Ashburton,—You will perhaps recollect some time ago your brother Alick and I purchased land at Church Street, Kensington, and we have since sold it to Messrs. Holloway and Douglas for 80,000*l.* Mr. Holloway is a well-known builder in London, as he enjoyed the confidence of the late Sir Blundell Maple, and there are several records to his credit standing in the country, such as the Hotel Great Central and the Metropole at Brighton and the Majestic at Harrogate, &c. Mr. Douglas has had considerable experience down at Kensington, and between them they will, I think, do very well.

"I merely mention this to show that we are not dealing with men of straw, and at the same time it shows their idea of the value of this site. They now seek to borrow on the property about 65,000*l.* at 5 or 5½ per cent., paying a bonus of 500*l.* on obtaining the money. They are prepared to put up the interest for two years, so that there will be no mistake about its payment, as in that time, of course, there will be buildings on the property, all of which will go to the credit of this security. As a matter of fact, they have already received an offer of 7500*l.* a year ground rent for the whole of the property, but I question whether they will accept it. It has occurred to me that if we

could get the money at 4 per cent. from Parr's or somewhere, and they, Holloway and Douglas, pay you 5½ per cent., you would be netting a clear 1½ per cent., or about 800*l.* per annum; even on a clear 1 per cent. you would make 650*l.* together with a bonus down of 500*l.*, which is always very useful.

"I should mention that arrangements have been made to finance the scheme up to 40,000*l.* or 50,000*l.*, and this, of course, all goes to the benefit of the first mortgage, because every brick which is laid goes to the credit of the first security. Now let us look at the worst aspects of the business. You might be landed with this property for 65,000*l.*; at the same time you would have buildings on it to the tune of the amounts spent thereon; you have the personal covenant to exhaust of Messrs. Douglas and Holloway, likewise the personal covenant of any one that they sub-let land to, which they will do no doubt. In my opinion none of these things are likely to occur, but if they do I should not at all mind you stepping in for 65,000*l.*, plus the buildings thereon.

"If you would like a valuer to give you any idea by all means appoint one, but the figures speak for themselves, and Messrs. Douglas and Holloway are shrewd men of business and not likely to buy 'a pig in a poke.'

"If your lordship is not likely to be in town, and would like to see me, I will run down with pleasure, but this has got to be done and I have much pleasure in offering you the first chance, as there is no particular risk but a little bit to be made.

"Do you mind sending me a wire to-morrow to the office?

"Very faithfully yours,

"(Signed) W. Nocton."

Lord Ashburton replied that he had no objection to lending the money provided the valuation was satisfactory and the terms equally so. Nocton then instructed Messrs. Hamnett & Co., surveyors, of London, through whose agency the Church Street property had been sold to Baring, to report upon the property, but whether they were instructed to report on behalf of Lord Ashburton as an intending mortgagee was disputed. The report was made on May 17 and was of an inconclusive character, but in the view taken by the Courts of this part of the case it is not

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necessary to refer to it further. On May 18 Nocton applied on behalf of Lord Ashburton to the Economic Life Assurance Society for a loan of 78,000*l.*, ultimately reduced to 75,000*l.*, the balance over and above the 65,000*l.* being required to pay off a debt due from Lord Ashburton to his brother. The society agreed to lend the money upon the security of a sub-mortgage of the proposed mortgage of the Church Street property and a first mortgage of other properties in Kensington belonging to Lord Ashburton, subject to a valuation by their own surveyor of the latter properties. These properties were valued by Mr. Robert Vigers on behalf of the society at 52,400*l.*

In July Nocton's partners entered into a correspondence with Lord Ashburton in the course of which they warned him against the risk he was incurring in proposing to advance 65,000*l.* on the Church Street property and the inadequacy of the profit offered in view of the risk to be run, reminded him that Nocton had a large financial interest in the property, and strongly urged him before further committing himself to obtain independent advice on the matter. Lord Ashburton, however, disregarded their warnings.

The transactions with regard to the Church Street property above referred to were carried into effect by a series of contemporaneous deeds executed on September 26, 1904, namely—(1.) a conveyance of the Church Street property to Douglas and Holloway expressed to be in consideration of 80,000*l.*; (2.) a mortgage by Douglas and Holloway to Lord Ashburton of the Church Street property to secure 65,000*l.*; (3.) a second mortgage by Douglas and Holloway to Baring to secure 15,000*l.*; (4.) a mortgage by Lord Ashburton to the Economic Life Assurance Society of his lordship's said Kensington properties to secure 75,000*l.*; (5.) a sub-mortgage by Lord Ashburton to the Economic Society of the mortgage for 65,000*l.* as collateral security for the 75,000*l.* On various subsequent occasions Baring made further advances on the security of the Church Street property.

Douglas and Holloway then proceeded to develop the property. They divided it into six plots and entered into an agreement with one Harry Johnson, a builder, whereby Johnson agreed to erect blocks of flats on the several plots and Douglas and Holloway agreed thereupon to grant leases thereof to Johnson

for a term of ninety-nine years at agreed rents. In the autumn of 1905 Block A was practically completed and a lease thereof was granted to Johnson at 1300*l.* a year. Block B was almost completed and a lease of that block also was granted at the same rent. Johnson became bankrupt before completing the building agreement and no buildings were erected on any of the other plots. On November 16, 1905, Nocton, in the name of his firm, wrote a letter to the secretary of the Economic Life Assurance Society wherein he stated that a further sum of 20,000*l.* was required by Douglas and Holloway to finance Johnson, the builder who had taken a building agreement, and submitted proposals to the society that they should either advance a further 20,000*l.* on their existing security or should release from their security Block A, and the letter contained the following dassage. "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them." The society then instructed their surveyor Vigers to report and advise them whether they could safely release Block A from their security. On December 4 the secretary of the society informed Nocton by letter that he had received a satisfactory report from Vigers and that the society consented to release Block A from their security.

On December 9, 1905, Nocton wrote to Lord Ashburton as follows :—

"Dear Lord Ashburton,—For the purpose of financing the building upon the Church Street, Kensington, site, which will be known as 'York House,' it is necessary that the first lot of flats, which are known as Block A, should be released from the mortgage. The Economic Life Assurance Society have agreed to release it from their mortgage, and I am now writing to ask you to release it from your mortgage. The necessary deed is being prepared in anticipation of your consent, and will be ready for signature very shortly. The Economic Society sent their surveyor, Mr. Robert Vigers, to look at the property with a view to testing the security before they consented to release it. This, I think you will agree with me, is very satisfactory.

"Yours very faithfully,

"(Signed) W. Nocton."

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Nocton did not see Vigers' report until shortly before this action was commenced. The report was founded to a large extent upon the margin of security upon Lord Ashburton's Kensington properties. The release was effected by a deed dated December 28, 1905, whereby the Economic Life Assurance Society and Lord Ashburton released Block A to Baring free and discharged from their respective mortgage debts of 75,000*l.* and 65,000*l.* The effect of the release was to make the mortgage of September 26, 1904, to Baring to secure 15,000*l.*, in which Nocton was interested to the extent of one moiety, a first charge on Block A.

Default was made in payment of the interest upon the 65,000*l.* mortgage debt which fell due upon September 26, 1909, and it then appeared that the Church Street property was a wholly inadequate security for that sum.

On March 10, 1911, Lord Ashburton commenced this action against Nocton and the various persons interested in the equity of redemption in the Church Street property and against the Economic Life Assurance Society.

By his statement of claim the plaintiff alleged (paragraph 13) with regard to the mortgage for 65,000*l.* that in advising the plaintiff to borrow the 75,000*l.* and to make the advance of 65,000*l.* the advice of the defendant Nocton was not that of a solicitor advising his client in good faith, but was given for his own private ends. The release of Block A from the plaintiff's mortgage was dealt with in paragraphs 31 to 33 of the statement of claim.

The two earlier paragraphs narrated the facts relating to the release. Paragraph 33 was as follows: "The said Block A was in fact the most valuable part of the plaintiff's said security and when the same was so released as aforesaid the property remaining subject to the plaintiff's said mortgage was wholly insufficient as a security for the said sum of 65,000*l.* The defendant Nocton well knew when he advised the plaintiff to execute the said release that thereby the plaintiff's security would be rendered insufficient and his said advice was not independent advice and was not given in good faith but was given in his own personal interest without regard to the interest of

the plaintiff to the intent that thereby he might get the benefit of a first charge upon the said Block A for the sum of 15,000*l.* secured by the said second mortgage of the 26th day of September 1904 to one moiety whereof he was entitled as aforesaid. The defendant Nocton in advising the plaintiff to execute the said release allowed the plaintiff to believe that he was advising the plaintiff independently and in good faith and in the plaintiff's interest. The plaintiff in executing the said release had no independent advice and acted entirely upon the advice of the defendant Nocton and with full confidence in him."

By the claim the plaintiff claimed (inter alia) (1.) a declaration that he was improperly advised and induced by the defendant Nocton whilst acting as the plaintiff's confidential solicitor to advance the sum of 65,000*l.* to Douglas and Holloway and with a view thereto to borrow the sum of 75,000*l.* upon the securities above referred to, and (2.) a declaration that the defendant Nocton was liable to indemnify the plaintiff in respect of the said transactions and to make good and repay to the plaintiff the 65,000*l.* with interest and all sums paid by the plaintiff to him or his firm for costs, charges, and expenses in respect of the several mortgages of September 26, 1904, with consequential relief. The plaintiff, however, did not claim any specific relief in respect of the release of December 28, 1905.

The defendant Nocton by his defence denied all the allegations of fraud and pleaded the Statute of Limitations.

Neville J. found that, although the defendant Nocton fell far short of the duty which he owed to his client as a solicitor, the plaintiff had failed to make out a charge of fraud against him, and he held that as the action was based solely upon fraud it was not maintainable. He accordingly dismissed the action as against the defendant Nocton with costs.

The Court of Appeal, while agreeing with Neville J. that it would be wrong to allow a charge of fraud to be converted into a charge of negligence, differed from him on the facts. So far as regards the claim in respect of the 65,000*l.* they held that, in view of the warnings given to the plaintiff by the defendant Nocton's partners, the plaintiff had failed to establish any case of concealed fraud against the defendant Nocton, and that the Statute

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of Limitations was therefore a complete answer to the claim. But with regard to the release they found that the defendant Nocton had been guilty of fraud, and granted relief on that footing.

The order of the Court of Appeal ordered that the plaintiff do recover against the defendant Nocton the sum of 3789*l.* odd (being the sum of 1300*l.* per annum less income tax from September 26, 1909, when the default first occurred in payment of the interest on the mortgage for 65,000*l.* in the statement of claim mentioned to the date of this order) in part payment of the damages to be ascertained under the inquiry thereby directed, and directed an inquiry to be made before an official referee what damages (if any) had been sustained by the plaintiff by reason of the release of Block A from the security referred to in paragraphs 31 to 33 of the statement of claim.

The defendant Nocton appealed against this order, and there was also a cross-appeal by the plaintiff on the ground that the relief granted was not sufficiently extensive. The plaintiff, however, did not propose to proceed with his cross-appeal except in the event of a decision against him on the main appeal.

1914. April 23, 24, 27; May 1, 8. *P. O. Lawrence, K.C.*, and *Peterson, K.C.* (with them *J. W. Manning*), for the appellant. No fraud is proved against the appellant, and, as the action rested on fraud, it was rightly dismissed by Neville J. This claim is based wholly on fraud, and if the charge of fraud fails it cannot be converted into a charge of negligence: *Wilde* v. *Gibson* (1); *Glascott* v. *Lang* (2); *Archbold* v. *Commissioners of Charitable Bequests for Ireland* (3); *Thom* v. *Bigland* (4); *Hickson* v. *Lombard* (5); *Swinfen* v. *Lord Chelmsford* (6); *London Chartered Bank of Australia* v. *Lemprière* (7); *Connecticut Fire Insurance Co.* v. *Kavanagh.* (8) These authorities shew further that if the statement of claim, apart from the allegations of fraud, discloses a good cause of action the plaintiff may recover. But here the

(1) (1848) 1 H. L. C. 605.
(2) (1847) 2 Ph. 310.
(3) (1849) 2 H. L. C. 440.
(4) (1853) 8 Ex. 725.
(5) (1866) L. R. 1 H. L. 324.
(6) (1860) 5 H. & N. 890.
(7) (1873) L. R. 4 P. C. 572.
(8) [1892] A. C. 473.

only two grounds of relief against the appellant are fraud and negligence, and negligence is not pleaded. Where an action is based solely on fraud the Court will not allow the pleadings to be amended so as to raise a new cause of action, and in this case the Statute of Limitations would be an answer to any application to amend. It is further to be noted that the claim asks no relief in respect of the 1905 transaction, which is the subject of this appeal. The sole question is whether the appellant fraudulently represented that the security was sufficient. In *Dick* v. *Alston* (1) the present Lord Chancellor gives an exhaustive enumeration of the several heads of relief (apart from fraud) which may be granted against a solicitor at the suit of his client. Those are, first, damages for negligence, where the solicitor does not give proper advice or exercise proper skill; secondly, accountability, where the solicitor during the continuance of his employment takes a benefit from his client; and thirdly, rescission, where the solicitor, acting as such, makes a bargain with his client. This case falls under the first head of relief, and the second and third heads have no application. The decision of this House in *Derry* v. *Peek* (2) finally established that to maintain an action of deceit proof of moral fraud was necessary. That decision, however, did not purport to lay down any new law or to touch any action for misrepresentation in which there was a remedy independently of fraud. Those actions fall under four heads: (1.) Actions on a warranty; (2.) actions where there exists a legal obligation to give correct information, e.g., cases of marine and life assurance; (3.) actions where there is a negligent misrepresentation by a person who has contracted to be careful; and (4.) actions where the defendant is estopped from denying the truth of the representation: see *Low* v. *Bouverie* (3) and *Fry* v. *Smellie*. (4) It may be suggested that there is an equitable jurisdiction to grant relief in this case on the footing of a breach of fiduciary obligation, but there is no concurrent or other jurisdiction in equity to grant relief in cases of misrepresentation except in (1.) cases of fraud, (2.) cases of rescission, and (3.) cases

(1) 1913 S. C. (H. L.) 57.
(2) 14 App. Cas. 337.
(3) [1891] 3 Ch. 82.
(4) [1912] 3 K. B. 282, at p. 295.

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of estoppel. The law upon this point is correctly stated by Sir Roundell Palmer in his argument in *Peek* v. *Gurney*. (1) The Court exercises an equitable jurisdiction over persons standing in a fiduciary relation in cases to which that doctrine applies, as for example in cases of undue influence, but that is a different head of jurisdiction. Whatever duty may exist by reason of fiduciary relationship a person standing in that relationship is not thereby put under any special liability in regard to misrepresentation, and a trustee or solicitor is no more liable for an innocent misrepresentation than any other person. Fraud being out of the way, apart from the special cases above mentioned, there is no remedy against a solicitor either for misrepresentation or for wrong advice except on the ground of negligence. The only two cases opposed to this contention are *Slim* v. *Croucher* (2) and *Re Ward* (3), and those cases are inconsistent with *Derry* v. *Peek* (4): see *Low* v. *Bouverie*. (5) *Burrowes* v. *Lock* (6) was there explained on the ground of estoppel. *Evans* v. *Bicknell* (7) was put by Lord Eldon on fraud. If the old Court of Chancery had an independent jurisdiction to compel a man to make good his representations of fact, that jurisdiction must have been preserved by the provision of the Judicature Act that in cases of conflict the equitable doctrine should prevail. Therefore on that hypothesis *Derry* v. *Peek* (4) must have been wrongly decided. It follows that the only liability of the solicitor in this case is for breach of the obligation to be careful; but the form of the action precludes the respondent from claiming relief on that head.

The following cases were also referred to: *Gillespie & Sons* v. *Gardner* (8); *Brownlie* v. *Campbell* (9); *Barley* v. *Walford* (10); *Edgington* v. *Fitzmaurice* (11); *Maddison* v. *Alderson* (12); *Rawlins* v. *Wickham* (13); *McPherson's Trustees* v. *Watt* (14); *Torrance* v.

(1) (1871) L. R. 13 Eq. 79, at p. 97.
(2) (1860) 1 D. F. & J. 518.
(3) (1862) 31 Beav. 1.
(4) 14 App. Cas. 337.
(5) [1891] Ch. 82, at pp. 106, 109.
(6) (1805) 10 Ves. 470.
(7) (1801) 6 Ves. 174, at p. 182.
(8) 1909 S. C. 1053.
(9) (1880) 5 App. Cas. 925.
(10) (1846) 9 Q. B. 197.
(11) (1885) 29 Ch. D. 459.
(12) (1883) 8 App. Cas. 467.
(13) (1858) 3 De G. & J. 304.
(14) (1877) 5 R. (H. L.) 9.

Bolton (1); *Central Ry. Co. of Venezuela* v. *Kisch* (2); *Bank of Montreal* v. *Stuart.* (3)

Jenkins, K.C. (*Sir R. Finlay, K.C.*, and *A. à B. Terrell* with him), for the respondent.

[VISCOUNT HALDANE L.C. Subject to anything you may say I am not prepared to differ from the judgment of Neville J. on the question whether Nocton had a fraudulent intent.]

If the judgment of the Court of Appeal can be supported on the footing of negligence or on the analogy of negligence the plaintiff does not desire to proceed with his cross-appeal. As regards the Statute of Limitations the plaintiff's case on the original transaction was put not on concealed fraud but on property, i.e., on the ground that the money was held by the solicitor in trust for his principal. Assuming that fraud is out of the question, the allegations in the statement of claim are wide enough to found a claim for dereliction of duty by a person occupying a fiduciary relation. In the old cases in equity the term "fraud" was frequently applied to cases of a breach of fiduciary obligation.

[He was stopped.]

The House took time for consideration.

June 19. VISCOUNT HALDANE L.C. My Lords, in the judgment I am about to read, my noble and learned friend Lord Atkinson desires me to say that he concurs.

My Lords, owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument. But when the real character of the litigation has been made plain the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance.

The action was brought by the respondent, Lord Ashburton, against the appellant, who had acted as his solicitor, for a declaration that the solicitor had improperly advised and induced him to advance 65,000*l.* upon a mortgage made in 1904 by other

(1) (1872) L. R. 8 Ch. 118. (2) (1867) L. R. 2 H. L. 99.
(3) [1911] A. C. 120.

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clients of the solicitor, a transaction out of which the solicitor was said to have got an advantage for himself, and for an order for indemnity against loss of interest and for replacement of the sum advanced. This was the prominent head of the relief sought. But by the statement of claim a further case was made which was really covered by the main relief asked for, and which only arose if, as happened, the claim for replacement of the amount of the mortgage was barred by acquiescence or by the Statute of Limitations.

It was alleged that subsequently, in December, 1905, a date within six years from the issue of the writ, the solicitor had improperly and in bad faith advised and induced Lord Ashburton to release from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for 15,000*l.* in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was insufficient, and that loss both of security for the principal sum of 65,000*l.* and of interest had occurred in consequence of the release. The defence was knowledge of the facts and of the position of the appellant on the part of Lord Ashburton, as well as a denial of the material allegations in the statement of claim, and a plea of the Statute of Limitations.

My Lords, I do not propose to enter into an examination of the evidence. The action was tried before Neville J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved, and it was not enough to prove the mere fact that a solicitor, in advising his client, was actuated by the belief that some advantage would accrue to himself. He found that, although the respondent "fell far short of the duty which he was under as solicitor" to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. The learned judge was no doubt influenced by the fact

that Lord Ashburton had previously embarked, to the knowledge and with the co-operation of the appellant, in other speculative transactions of large amounts, and that the release of the particular security in question might have enabled the mortgagors to raise more money and develop the value of Lord Ashburton's remaining security. At all events, he held that, while the appellant had failed in his duty and given bad advice, the case as launched was one in which charges of actual fraud had been made as its foundation, and that these charges having, as he thought, failed, the action ought to be dismissed.

The Court of Appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with Neville J., said that "it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence." As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal therefore gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee.

My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal. I have read the evidence of the appellant, and, although it is obviously unreliable evidence, it leaves on my mind the same impression that it left on that of the learned judge who heard it, that the solicitor did not consciously intend to defraud his client, but, largely owing to a confused state of mind, believed that he was properly joining with him and guiding him in a good speculation.

I cannot, therefore, treat the case, so far as based on intention to deceive, as made out. But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the

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way the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer to your Lordships, I do not think that this is so.

My Lords, much of the argument at the Bar turned on the interpretation of what was laid down by this House in *Derry* v. *Peek*. (1) It is of importance to be sure of what really was decided in that case. It has been the subject of much comment, both on what is expressly decided and on what has been considered to be implied in the judgments. The facts were these: A special Act incorporating a tramway company provided that the carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by the Act the company had the right to use steam power. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power, and the company was wound up. The plaintiff then brought an action of deceit against the directors, based on the untrue statement. The case was tried in the Chancery Division, before Stirling J. He came to the conclusion that the defendants thought that what they had stated was true, inasmuch as they took the consent of the Board of Trade to be a matter of course, and he dismissed the action on the ground that there was no intention to deceive.

The Court of Appeal held that the directors ought to have taken care that they had reasonable grounds for their statement,

(1) 14 App. Cas. 337.

and that as they had no reasonable grounds for making it, they were liable, notwithstanding that they had not intended to deceive. This House reversed that judgment and held that, the action being one of deceit, it was necessary to prove actual fraud. Fraud must be proved by shewing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by shewing that it was made under an honest impression that it was true.

My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry* v. *Peek* (1) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords shew a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten.

Even the action on the case for deceit was itself evolved by the judges, as is shewn by the dissenting judgment of Grose J. in *Pasley* v. *Freeman* (2) so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise care by persons in particular situations, who are doing acts which

(1) 14 App. Cas. 337. (2) (1789) 3 T. R. 51.

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may injure the property or persons of others; of implied contract, as shewn in the evolution of the action of assumpsit and its development from case; of the liability of the agent, who came at last to be treated as warranting the authority which he asserted; of the right to an injunction and an account in equity in cases of passing off goods, as explained and contrasted with claims based on deceit in Lord Westbury's judgment in *Edelsten* v. *Edelsten* (1), and in such later authorities as the judgment of Farwell J. in *Bourne* v. *Swan & Edgar* (2); these doctrines and the like illustrate the freedom which has been exercised by the judges in making new applications of recognized principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

The decision of the House of Lords in *Derry* v. *Peek* (3) was applied by the Court of Appeal in another case relating to a prospectus, a case which, like *Derry* v. *Peek* (3), has given rise to comment. In *Angus* v. *Clifford* (4) the directors had affirmed in their prospectus that the reports of certain mining engineers "were prepared for the directors" when they were really prepared for the promoters. The judge who tried the case thought that the directors had not taken proper care as to what they stated, and held them liable. But he did not find that they had made the untrue statements fraudulently as distinguished from carelessly. The Court of Appeal applied the law as laid down in *Derry* v. *Peek*. (3) As the judge who tried the case had not found fraud they considered that they could not properly do so,

(1) (1863) 1 D. J. & S. 185.
(2) [1903] 1 Ch. 211.
(3) 14 App. Cas. 337.
(4) [1891] 2 Ch. 449.

and treated the words used as having been simply passed over by the directors without seeing their importance. This they thought amounted to gross and culpable carelessness in the use of language, but not to dishonesty, and they took the view that *Derry* v. *Peek* (1) had decided that there was no legal duty cast upon persons in such a position to take reasonable care in forming their belief. Bowen L.J. observed that while there was nothing new in deciding, as had been done by the House of Lords, that proof of an actually fraudulent mind was necessary to found an action for deceit at common law, the really important step taken was the decision, which he seems to have taken to be of very general application, that there was no duty to be careful in such cases. An honest blunder in the use of language is not dishonest, and unless there is such a duty is not actionable.

My Lords, it is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine. I do not wonder that the decisions in *Derry* v. *Peek* (1) and *Angus* v. *Clifford* (2) have on this point given rise to some heartburning. But the principle laid down that a mens rea is essential, in the absence of a duty to be careful, was no new one, nor is it now open to question. The difficulty as regards the principle lies in its application to individual cases. It is to the view taken of the facts by the judge of first instance, who has tried the question of fact and decided on which side of the line of demarcation the case lies, that comment should be generally directed. For, though not impossible, it is difficult for a Court of Appeal to review his finding after seeing the witnesses, especially in cases of this class. What requires closer consideration is the generality of the language used in some of the judgments of this House in *Derry* v. *Peek* (1), to the effect that in such cases there is no legal as distinguished from moral duty to be careful. Soon after the decision the Legislature, in the Directors' Liability Act of 1890, imposed a statutory obligation on those who issue prospectuses. But in other cases the decision remains binding as to what is really established, and its principle stands.

(1) 14 App. Cas. 337. (2) [1891] 2 Ch. 449.

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To what cases, then, does that principle extend? In his judgment Lord Herschell (at p. 360) carefully excluded from it "those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course." In such cases he thought, following what Lord Selborne had said in *Brownlie* v. *Campbell* (1), that honest belief in the truth of the answer was no defence.

This exception was considered by the Court of Appeal, consisting of Lindley, Bowen, and Kay L.JJ., the Court that had decided *Angus* v. *Clifford* (2), in *Low* v. *Bouverie.* (3) There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject to certain incumbrances which he mentioned, but he did not say there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case.

Lindley L.J. said that in the absence of such a duty the trustee could not be made liable. Before *Derry* v. *Peek* (4) he observed that it had been generally supposed to have been settled in equity that a person who carelessly, although honestly, made a false representation as to matters within his special knowledge to another about to deal in a matter of business on the faith of the representation was liable. *Burrowes* v. *Lock* (5) and *Slim* v. *Croucher* (6) were regarded as having laid this down. But *Burrowes* v. *Lock* (5) could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unencumbered, as he had asserted this in unambiguous

(1) 5 App. Cas. 925, at p. 935.
(2) [1891] 2 Ch. 449.
(3) [1891] 3 Ch. 82.
(4) 14 App. Cas. 337.
(5) 10 Ves. 470.
(6) 1 D. F. & J. 518.

words on the faith of which the plaintiff in the suit had changed his position. It could not be supported on the wider ground. *Slim* v. *Croucher* (1), in which the assertion was that a valid lease would be granted in the future, could not be supported on the ground of estoppel, and, as he thought, probably could not be on that of warranty. It must therefore, in his opinion, be taken to be no longer law. In the case before him, *Low* v. *Bouverie* (2), there was no such precision of statement about the absence of incumbrances as could give rise to estoppel. Lindley and Bowen L.JJ. concurred in holding that if there had been a duty to be careful the case would have been untouched by *Derry* v. *Peek*. (3) But they held that as such a breach of duty did not exist, and as fraud, warranty, and estoppel were all negatived, there was no liability.

My Lords, in *Slim* v. *Croucher* (1) the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease. It is not, however, necessary to express an opinion on the point. But in the appeal before us I do not think that any question of warranty or estoppel arises, and if moral fraud has not been established the only question which remains is whether there has been such a breach of duty as gives rise to liability. Now such a duty might arise either at law or in equity. And I do not understand Lord Herschell, who mentioned the case of a legal as distinguished from merely a moral duty, to have intended in any way to exclude duty of which only a Court of Equity took cognizance. If among the great common lawyers who decided *Derry* v. *Peek* (3) there had been present some versed in the practice of the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy.

My Lords, it is known that in cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times. For some of these cases the

(1) 1 D. F. & J. 518. (2) [1891] 3 Ch. 82.
(3) 14 App. Cas. 337.

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greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a Court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury.

But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in *Chesterfield* v. *Janssen*. (1) I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* (2) imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent.

The judgment in *Evans* v. *Bicknell* (3) of Lord Eldon, who not only possessed wide experience of Chancery procedure but had been Chief Justice of the Common Pleas, is instructive as to the character of the equity jurisdiction, especially so far as it is concurrent, and another great judge, Sir William Grant, confirmed his view in *Burrowes* v. *Lock*. (4) The latter case can probably be now supported only on the ground of estoppel, but the exposition of the principle of the concurrent jurisdiction remains intact.

A similar observation applies to *Slim* v. *Croucher* (5), to which

(1) (1750) 2 Ves. Sen. 125.
(2) 14 App. Cas. 337.
(3) 6 Ves. 174.
(4) 10 Ves. 470.
(5) 1 D. F. & J. 518.

I have already referred. It was not expressly found that there was a duty in breach of which the misrepresentation alleged was made, and there was neither fraud nor estoppel. But the case remains valuable, whatever view may be taken of its result, on account of the exposition of the equity jurisdiction given by Lord Campbell L.C. and Knight Bruce and Turner L.JJ., judges of great experience. So far as the equity jurisdiction in cases of what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved. But there are cases of other classes to which, as I have already said, the Court of Chancery undoubtedly did apply the term fraud, although I think unfortunately.

Fraud in such cases is, as James L.J. said in *Torrance* v. *Bolton* (1), "nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any instrument, or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the Court has dealt with contracts of that kind —contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done." In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction. What was laid down by Lord Eldon in this House in *Bulkley* v. *Wilford* (2) explains the nature of the duty.

My Lords, I have dealt thus fully with this distinction because I think that confusion has arisen from overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent

(1) (1872) L.R. 8 Ch. 118, at p. 124. (2) (1834) 2 Cl. & F. 102, at p. 177.

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intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Derry v. *Peek* (1) simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.

The Courts had also power to rescind contracts of many kinds

(1) 14 App. Cas. 337.

obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material misstatement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the Courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry* v. *Peek* (1) the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the Courts would not allow him to say that he was ignorant.

Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry* v. *Peek* (1) an authority for the suggestion that an action for damages for misrepresentation without an actual

(1) 14 App. Cas. 337.

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intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shewn to exist.

My Lords, the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor. The judgment of Hall V.-C. in *British Mutual Investment Co.* v. *Cobbold* (1) is in accordance with this view.

This, however, does not end the matter. When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of

(1) (1875) L. R. 19 Eq. 627.

a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of Lord Hatherley L.C. in *Burdick* v. *Garrick* (1), the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands.

My Lords, since the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Jessel M.R. in *Cockburn* v. *Edwards* (2) may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably deliberately done in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.

I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. A

(1) (1870) L. R. 5 Ch. 233. (2) (1881) 18 Ch. D. 449

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study of the evidence of the appellant has brought me to the conclusion that Neville J. was probably right in the conclusion he reached. I think the appellant was negligent and rash and regardless of the obligations of his position. I think his evidence utterly untrustworthy. But I cannot agree in holding that Neville J. has been shewn to be wrong in refusing to draw the inference that he intended to cheat.

My Lords, the conclusion at which I have arrived is that this action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill. The main head of claim, that relating to the mortgage of 1904, is barred in equity by the acquiescence of the plaintiff, and at law by the Statute of Limitations.

The second head of claim, which is quite sufficiently stated in the pleadings, is not so barred. I am of opinion that Lord Ashburton was entitled to succeed on this second claim. The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events, Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now.

There was before us a cross-appeal by the respondent from the decision against him that he could not now complain of the transaction in 1904 relative to his mortgage for 65,000*l*. I think that, on the ground assigned by the Court of Appeal, that claim fails. For the reasons I have given, and, having regard to the unsatisfactory way in which Mr. Nocton gave his evidence, I think that no injustice has been done by any part of the order under review, and I move that this appeal and the cross-appeal be each dismissed with costs.

LORD DUNEDIN. My Lords, this action as originally brought by the respondent, Lord Ashburton, against his quondam solicitor, the appellant, asked for relief in respect of a sum of 65,000*l.* which he had on his advice advanced on mortgage over certain property in Church Street, Kensington. This property, which consisted of land available for building, had been acquired by the appellant from the then owners as a joint speculation on behalf of himself and the Hon. A. Baring, the brother of the respondent, for the sum of 60,000*l.* The purchase-money had been obtained by means of a temporary advance from Parr's Bank. The co-adventurers had then made a sub-sale to the firm of Messrs. Douglas and Holloway, builders, at the price of 80,000*l.* The sub-sale, however, was only valid if certain conditions were fulfilled, the material ones to mention being (1.) that the purchasers should be able to obtain a loan of 65,000*l.* on the property; (2.) that they should obtain a loan of 15,000*l.* from the vendors on mortgage postponed to the 65,000*l.*; and (3.) that they should obtain another loan again postponed of 47,000*l.* The scheme was that on these sums being advanced the land should be covered by blocks of residential buildings, which should then be let at a ground rent, and the sale of the ground rents would realize sums sufficient to pay off the series of mortgages. It is evident that on the success of the whole scheme depended the chance of the appellant securing his half-share of the 20,000*l.* profit made by the sale to Douglas and Holloway. The appellant accordingly approached his client, Lord Ashburton, to lend the 65,000*l.* on mortgage on the Church Street property, which he did. Out of the money so received the temporary advance to Parr's Bank was paid off. It should here be explained that as Lord Ashburton had not at the moment 65,000*l.* available, the form the transaction took was this. He borrowed 75,000*l.* from the Economic Assurance Company, and as security therefor gave the mortgage aforesaid of 65,000*l.*, and also a mortgage over other property of his own, which was valued by Mr. Vigers on behalf of the Economic at 52,400*l.*

The ground on which relief was sought was that the appellant had fraudulently induced the respondent to lend the 65,000*l.* by misrepresentations as to the true value of the security. Neville J.,

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by whom the action was tried, found that the respondent had failed to prove fraud. The Court of Appeal on this main question found that it was unnecessary to consider whether this was right or not. They found that in any case a subsequent communication had been made to Lord Ashburton by the partners of Nocton, with whom he had come to have differences, which communication either disclosed the whole true state of the facts, or at least put Lord Ashburton on his inquiry; that Lord Ashburton refused to take any steps, and that since that communication the years prescribed by the Statute of Limitations expired before action was brought, and that consequently the action was barred. A cross-appeal was taken by Lord Ashburton against this judgment, but was abandoned at your Lordships' Bar. The main question in the action as raised is therefore out of the case.

There was, however, a second point in respect of which relief was sought, which necessitates a continuance of the story. The various sums of money above mentioned were all raised, and Douglas and Holloway proceeded to build by means of a subcontract with a Mr. Johnson, a practical builder. There were to be six blocks of buildings, numbered A to F. Block A was practically completed, and was let at a ground rent of 1300*l.* per annum, Block B was very nearly completed, the others had not been begun when Douglas and Holloway, and Johnson, ran short of money. In the state of the title above mentioned it was obviously impossible to raise any more money by postponed mortgages. It therefore occurred to Nocton that the best way to get more money would be, if possible, to get the mortgagees of the 65,000*l.* to release Block A from their security. Block A being covered with buildings, and let at a ground rent of 1300*l.* per annum, would then be an efficient source of credit.

Now, as already stated, the legal holder of the 65,000*l.* was the Economic Assurance Company. But the person really most affected by the transaction would be Lord Ashburton, because he had become personally liable to the Economic for 75,000*l.*, and had given 52,000*l.* worth of other property in mortgage. Nocton approached the Economic before he approached Lord Ashburton. He did so by a letter of November 16, 1905, in which he set out the state of matters, and proposed that the

society should release Block A. The letter contained the following sentence: "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them." The society replied that any agreement on their part must be subject to their receiving a favourable report from their own surveyor, Mr. Vigers, and stipulated that Nocton's clients should pay Vigers' fee. To this Nocton assented, and the society instructed Vigers to report. The result was that on December 4 Nocton received a letter from the secretary of the society in the following terms: "I have now received a satisfactory report from Mr. Vigers and I have to inform you that we consent to the release of Block A from our security." On December 9, 1905, Nocton sent the following letter to Lord Ashburton:—

"Dear Lord Ashburton,

"For the purpose of financing the building upon the Church Street Kensington site which will be known as 'York House' it is necessary that the first lot of flats which are known as 'Block A' should be released from the mortgage.

"The Economic Life Assurance Society have agreed to release it from their mortgage and I am now writing to ask you to release it from your mortgage.

"The necessary deed is being prepared in anticipation of your consent and will be ready for signature very shortly.

"The Economic Society sent their surveyor Mr. Robert Vigers to look at the property with a view to testing the security before they consented to release it. This I think you will agree with me is very satisfactory.

"Yours very faithfully,

"W. Nocton."

On January 1, 1906, Nocton sent the release to Lord Ashburton, who signed it.

It is not denied that the only information given to Lord Ashburton at this time was that contained in the said letter of December 9, 1905.

My Lords, I pause for a moment before examining what the relief actually claimed was, to consider the facts as they stand at this point. I have no hesitation in saying that the letter of

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December 9 was grossly misleading. It assumes that the question of release for the Economic is identical with the question for Lord Ashburton, and it refers to the report of Mr. Vigers in such terms as to clearly convey the idea that Vigers, if employed for Lord Ashburton, would have said that the remanent security after the release of Block A was sufficient. Now, Nocton knew perfectly well that the question for the Economic was a perfectly different one from that for Lord Ashburton, because the Economic, so far as their debt was concerned, had the additional security of 52,000*l.* worth of Lord Ashburton's other property. It will not do to say that if Lord Ashburton had remembered each of the individual facts of which he was cognizant at the time of the original transaction more than eighteen months before he could have pieced out for himself the true state of matters.

No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction. But besides that Nocton was in a fiduciary position. He was Lord Ashburton's solicitor, advising him as to the very transaction which he was himself proposing, and his position was, so to speak, aggravated by the fact that he himself was interested in the transaction going through, and that in a double sense; first, because the direct effect of the release of Block A from the 65,000*l.* mortgage was to raise the position of the 15,000*l.* mortgage held by Nocton and Baring to that of a first mortgage quoad that block; and, secondly, because, as already said, the ultimate success of the whole scheme was essential to the realization of the 20,000*l.* profit by Nocton and Baring.

In such a state of facts, I think it is not doubtful that the plaintiff ought to have a remedy, nor in any system in which law and equity were not separated would there, I think, any difficulty arise. I will venture to go further and say that, in my opinion, one of the objects of the legislation of 1873 was to prevent such difficulties arising in the law of England. Viewing the matter as I must do, as under the rules of the law of England, the question that at once arises is, Was the remedy of the plaintiff at law or in equity, or had he a remedy in both?

Now, as I understand the matter, if the action had been brought at law, under the old system it could have been based either (1.) on fraud, or (2.) on negligence, and the relief in either case would have been damages. But if based on fraud, then, in accordance with the decision in *Derry* v. *Peek* (1), the fraud proved must be actual fraud, a mens rea, an intention to deceive. It is an action of deceit.

Now, it is the case that the plaintiff here did aver fraud—he said that the things done and omitted to be done by the defendant in the part which he took in advising the release were fraudulently done and omitted to be done. Neville J. held that the mens rea had not been proved, and fraud being in the forefront of the pleadings, he held himself not entitled to treat the action as one for negligence. Further, fraud in the sense of mens rea not being proved, he held that the doctrine of *Derry* v. *Peek* (1) was as fully applicable to relief in equity as it was to relief at law. The Court of Appeal held that the behaviour of the appellant in this matter of the release was fraudulent, and granted relief in the shape of damages accordingly. They found on the facts that there was negligence, but assumed that, fraud being in the forefront of the pleadings, mere negligence could not be made the ground of relief. In the words of the Master of the Rolls, "It would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based upon negligence." Holding fraud proved, it became unnecessary for them to consider whether there was in default of law any equitable remedy to meet the situation.

Turning now to equity, here again, as I understand the situation, there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty. The matter has been exhaustively dealt with by my noble friend on the woolsack, and I do not propose to examine the cases. I will only make a few remarks. In the first place, it will be found that the word "fraud" in the older cases in Chancery is often used where the thing so characterized is a wrongful breach of duty, without a consideration of whether there is such a mens rea as would

(1) 14 App. Cas. 337.

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found an action for deceit. In the second place, all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising.

Now, whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or perhaps, more strictly speaking, overlap. Take the word negligence—the culpa of the Roman jurists. There can be no negligence unless there is a duty. That duty may arise in many ways. There are certain duties which all owe to the world at large; alterum non lædere is one. So the man who leaves the loaded gun in a public place is liable for the accident ensuing, though it is not he that pulls the trigger. The common law gives a remedy. Then there are duties which arise from contract, of which the solicitor's position gives an example—spondet peritiam artis—he contracts to be professionally qualified and to be careful. Here again the common law will give an action for negligence. And then there are the duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or of a guardian to his ward. It is in this latter class of cases that equity has been peculiarly dominant, not, I take it, from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where common justice demanded a remedy, the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right.

If, then, we turn to the solicitor's position we may look at it in two aspects, which is not to look at two different things, but to look at the same thing from two different points of view. He has contracted to be diligent; he is negligent. Law will give a remedy. It may well be that if a bill had been filed with a bald statement to the effect above, there might have been a demurrer for want of equity. He has not contracted that all representations made by him, if not negligently made, shall be true; and consequently, fraud apart, he cannot, on the law of *Derry* v. *Peek* (1), be made answerable at law for his representation. But from the

(1) 14 App. Cas. 337.

other point of view he may have put himself in a fiduciary position, and that fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client. He fails to do so. Equity will give a remedy to the client. This it does quite apart from the doctrine of *Derry* v. *Peek* (1), for in that case there was no fiduciary relationship, and the action had to be based on the representation alone.

Returning now to the pleadings in the present case, the case as originally launched, seeking for relief as to the 65,000*l.*, was undoubtedly based on fraud; and that fact tinged the form of the pleadings. That part of the case is gone; but the Court of Appeal thought that it dominated the pleadings as to the relief in respect of the release of Block A. It was held by the cases of *Archbold* (2), *Thom* (3), and *Swinfen* (4) that if on striking out the allegations of fraud a cause of action still remains, the action may proceed. I should myself have been prepared so to read paragraphs 31 and 33 of the statement of claim as to shew an averment of negligence even when the averments of fraud are struck out. In that case, as Neville J. says, "I think that Mr. Nocton fell far short of the duty which he was under as a solicitor to the plaintiff," and as the Court of Appeal held that the action, if based on negligence, was practically undefended, it would have been unnecessary to consider, as the Court of Appeal did, whether the fraud which Neville J. had held not proved was proved.

But apart from that, for the reasons given by my noble friend the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form that remedy would have taken would not have been damages, but, looking to the course the case has taken, I do not think it is incumbent on us to alter the remedy to another which would practically come to much the same. I accordingly agree with the motion made by my noble and learned friend.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the conclusion reached by the Lord Chancellor and with the judgment proposed.

(1) 14 App. Cas. 337.
(2) 2 H. L. C. 440.
(3) 8 Ex. 725.
(4) 5 H. & N. 890.

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It would have been satisfactory to my mind to have had the judgment of the Court of Appeal upon the merits of the question now being determined by this House. Owing to the view taken by that Court, however, upon the question of fraud it became unnecessary for their Lordships to deal with the case on any other footing. Fraud was negatived by Neville J., and the Court of Appeal has affirmed it. I humbly agree with Neville J. and with your Lordships that fraud was not established against the appellant.

I am of opinion that the facts as they appear from the evidence stand thus: The appellant and the respondent were both experienced and sanguine speculators in land. Lord Ashburton was as astute as the other. I still retain some doubt as to whether, if his co-speculator and solicitor, the appellant, had put all the then available facts correctly before him, he, the respondent, would not have taken the risk of going on with the speculation on the terms proposed. But I admit that that is in the realm of conjecture, and I am willing to assent to the view of your Lordships that the likelihood is the other way.

As, however, to the conduct of Mr. Nocton, his cardinal error is intelligible. He allowed the idea of his relations to Lord Ashburton as co-speculator to obscure the view which he ought steadily to have kept before him of Lord Ashburton as his client. The appellant was interested to the extent of a moiety of a mortgage of 15,000*l.* over the properties. For my own part, I do not believe that it ever occurred to him, in proposing the release of Block A, one of the mortgaged properties, that the effect of that transaction would be to give the 15,000*l.* a position of priority which it would not otherwise have obtained. I think further that upon the point of valuation Mr. Nocton was himself quite assured in his own mind that the valuation obtained from Messrs. Hamnett was sufficient and might be treated as equivalent to a separate valuation made up to date and for mortgagee's purpose. There are many other elements in the case which suggest to me that he did not intend on any occasion to defraud his client, but that most of his conduct now called in question arose from the fact that he was, with regard to these properties

and at the time of these transactions, in a confused, somewhat hustled, and very anxious state of mind.

I now turn to the pleadings. They do appear to me to contain averments sufficiently clear of the following facts: That Block A was the most valuable part of the respondent's security when the same was released; that the remainder was insufficient as a security for the existing mortgage of 65,000*l.*; that the respondent, Lord Ashburton, was approached by the appellant in order to have Block A released from his security; and I also read the averment as if none of the motive or inducement or suggestion of the transaction ever came from the respondent to the appellant, but on the contrary proceeded from the appellant to the respondent. The pleadings still further aver that the appellant advised the respondent that he would still have sufficient security, and that a valuation or valuations shewed this, whereas in point of fact this was not so. It is finally alleged that the respondent in executing the release had no independent advice, that he acted solely upon that proffered to him by the appellant, and that the appellant was himself interested in the property and in the obtaining of the release in the sense already mentioned.

My Lords, standing the averments thus, they appear to me to lay the basis of, and to give due notice of, a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and misstatements made by a person entrusted with a duty to another, and in failure of that duty. I have stated what is found in the pleadings, purposely deleting from them the allegations of fraud which they contain. I think that with those allegations of fraud deleted there was quite sufficient left in the pleadings for the determination of the case as it is now being settled by this House.

I incline to the view that prior to the passing of the Judicature Act this is a course which would have been taken in a Court of Equity. In *Hickson* v. *Lombard* (1) the Lord Chancellor, Lord Chelmsford, refers with approval to "the principle explained by Lord Cottenham in the case of *Archbold* v. *The Commissioners of Charitable Bequests in Ireland* (2), that where a bill alleges matters of fraud and all the subsequent considerations depend on

(1) (1866) L. R. 1 H. L. 324, at p. 331. (2) 2 H. L. C. 440, at p. 460.

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these matters which are not proved, the Court must necessarily dismiss the bill, 'but if fraud be imputed and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.'"

There is indeed in the present case a good deal to remind one of the observation of Pollock C.B. in *Swinfen* v. *Lord Chelmsford* (1): "If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, *though both be alleged*, and may recover upon the liability which the facts disclose, though *fraud* and *malice* be *disproved*, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not."

I need not pursue the later cases giving effect to the same view, but approaching the whole case as I do from an independent standpoint, I should have learned with surprise that, especially since the passing of the Judicature Act, this salutary rule of practice had been departed from, and I am relieved to think that the difficulty on the pleadings to which I have referred and which influenced the judgment of Neville J. does not seem serious to your Lordships.

Addressing myself to the merits of the case, I approach it, my Lords,—in this respect differing to some extent from the line along which some of your Lordships have advanced—by suggesting that the first consideration in these cases ought always to be, What was the relation in which the parties stood to each other at the time of the transaction in respect of which the claim for damage, compensation, or restitution is made? In the answer to that question, in my judgment, may be found a solution of not a few of the difficulties which arise in such actions.

Lindley L.J., in *Low* v. *Bouverie* (2), compendiously indicated the lines on which liability might be founded as fraud, breach of duty, warranty and estoppel. With regard to fraud, I do not believe it occurred in this case; the action is not founded on

(1) 5 H. & N. 890, at p. 920. (2) [1891] 3 Ch. 82.

warranty; and in the view that I take of it the safer and less complicated method of viewing this case is not as one of estoppel but as one of alleged breach of duty.

I accordingly repeat the question as to what were the relations of the parties here. Mr. Nocton was a solicitor; Lord Ashburton was his client. Mr. Nocton became responsible for statements that there had been a valuation and that there was sufficient margin in the remainder of the property to secure the existing debt, and that the release was accordingly a safe and sound transaction. (He was also, as a matter of fact, personally interested and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of Mr. Nocton was, in view of this fact, to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained: *Bank of Montreal* v. *Stuart* (1).) In the whole circumstances mentioned every step taken by the solicitor which subsequent disclosures shew to have been out of accord with fact became for him a step of danger—a danger of liability if through the erroneous step the client is misled and loss accrues.

Once, my Lords, the relation of parties has been so placed, it becomes manifest that the liability of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent.

My Lords, I am well aware of the fact that the case of *Derry* v. *Peek* (2) is in some quarters thought to have introduced a far-reaching change into the law. But if the question be approached from the point of view which I have stated, namely, of first ascertaining the relations which the parties bore to each other, then much assistance may be derived on the point—which is a vital point—as to what are the conditions and restrictions under and within which the supposed new rule of *Derry* v. *Peek* (2) can be held to operate. Does, in short, *Derry* v. *Peek* (2) cover the ground? I do not go further for this caution than *Derry* v. *Peek* (2) itself. In the previous history

(1) [1911] A. C. 120.
(2) 14 App. Cas. 337.

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of the law, as, for instance, in *Burrowes* v. *Lock* (1), and in certain expressions in *Brownlie* v. *Campbell* (2), the principle had been over and over again enunciated, but in *Derry* v. *Peek* (3) Lord Herschell gathers them together in these expressions: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock* (1) may be cited as an example, where a trustee had been asked by an intended lender upon the security of a trust fund whether notice of any prior encumbrances upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action."

The fact that the principle here set out was not held to cover the case of a company director holding out representations to the investing public—this fact no doubt led to the acceptance of *Derry* v. *Peek* (4) in certain quarters under protest. When Lord Herschell said, "I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea," he may have seemed to be giving an apt illustration of the general rule of liability to make good an assurance given. But it appeared it was not so; the decision was the other way, and this position was only changed by Parliament in the Directors Liability Act. And it should not be forgotten that *Derry* v. *Peek* (5) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that—this being so—what was decided was that fraud must ex necessitate contain the

(1) 10 Ves. 470.
(2) 5 App. Cas. 925.
(3) 14 App. Cas. at p. 360.
(4) 14 App. Cas. at p. 376.
(5) 14 App. Cas. 337.

element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but *Derry* v. *Peek* (1) as a decision was directed to the single and specific point just set out.

But although the principle was not applied to the position of directors, the principle itself was not abandoned, but was, as has been mentioned, distinctly enunciated. And with regard to dicta subsequent to *Derry* v. *Peek* and bearing upon that case, I venture to repeat the observation of Lord Bowen in *Low* v. *Bouverie*. (2) "*Derry* v. *Peek* (2)," said he, "decides . . . . that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry* v. *Peek* (1), the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful."

There is a passage, my Lords, in an argument used by Sir Roundell Palmer in *Peek* v. *Gurney* (3) which may well afford guidance as to the antecedent state of the law of equity. "Equity will interfere only in the following cases: first, wherever a contract is to be rescinded; secondly, where fraud, in the proper sense of the word, is to be redressed; thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with a warranty at law; and in order that a person may avail himself of relief founded on it he must shew that there was such a proximate relation between himself and the person making the representation as to bring them virtually

(1) 14 App. Cas. 337. (2) [1891] 3 Ch. 82.
(3) L. R. 13 Eq. 79, at p. 97.

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into the position of parties contracting with each other." These principles still remain.

My Lords, I purposely avoid the term "estoppel," but the principle to be found running through this branch of the law is, in my opinion, this: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith.

It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled.

LORD PARMOOR. My Lords, I should not have written a separate opinion had not a question of fraud been involved, and had I not come to the conclusion that such a charge cannot be maintained. The appellant was defendant in an action brought by the plaintiff charging him with fraud whilst acting as his confidential solicitor. Whether in addition the statement of claim would support an action for breach of duty in his employment as solicitor, apart from fraud, is a matter for subsequent consideration. Neville J. found that the charge of fraud had not been substantiated, and dismissed the action. It was held on appeal that, as to so much of the claim as was not barred by statutory limitation, the charge of fraud was established, and the defendant liable. Against this decision the appellant appealed, and a cross-appeal was lodged by the respondent, but not argued in your Lordships' House. The questions really are whether the

fraud charged against the defendant has been proved, and, if it has not been proved, whether the defendant is liable in negligence for breach of duty in his position as solicitor to the plaintiff.

On January 15, 1903, the Honourable Alexander Henry Baring, a brother of the respondent, entered into a contract for the purchase of certain freehold hereditaments in Church Street, Kensington, at the price of 60,000*l.* By an agreement of June 24, 1903, it was agreed between the said Alexander Henry Baring and the appellant that all profit and loss in connection with the purchase of the property should be divided in equal shares between them, and that the title deeds of the property should be lodged with Parr's Bank for the purpose of securing to them the repayment of an advance of 60,000*l.* and interest.

On February 10, 1904, a contract was entered into for the sale of the property to Thomas Holloway and John Douglas for the sum of 80,000*l.*, and the conveyance was completed on September 26, 1904, but it does not appear that Douglas and Holloway were in a position actually to find any of the purchase-money. After the contract had been entered into with Messrs. Douglas and Holloway, the appellant wrote to the respondent, on May 3, 1904, and suggested that the respondent should advance the sum of 65,000*l.* to Messrs. Douglas and Holloway on the security of the said property, and that he should receive a sum of 500*l.* from Messrs. Douglas and Holloway as a bonus, and borrow the amount required from his bank at a lower rate of interest than he was to receive. All the profit that the respondent could receive from the transaction would be the bonus of 500*l.* and the difference between the interest paid by him to his bank and the interest received by him from Messrs. Douglas and Holloway. The respondent arranged to borrow a sum of 75,000*l.* from the Economic Life Assurance Society on the security of certain freehold property in Kensington belonging to him, and of a sub-mortgage of the mortgage of 60,000*l.* on the said Church Street property created in his favour by Messrs. Douglas and Holloway. All necessary documents were prepared in connection with the above transactions, and arrangements were made with Harry Johnson, a builder, to erect residential flats in blocks on the property.

It is not necessary to consider at any greater length the

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transactions which took place up to this date, since any action which could be based thereon is barred by statutory limitation. It is, however, not unimportant, before considering the subsequent transactions on which the Court of Appeal held that the appellant was guilty of fraud, to note that the respondent was well aware that his solicitor, Mr. Nocton, was personally interested in the purchase of the property and in the building speculation. In other words, he employed the appellant as his solicitor although knowing that he was personally interested in the transactions on which he was giving advice. In addition, on July 26, 1904, Mr. Broughton, who was the senior partner of the firm of which the appellant was then a partner, wrote to the respondent calling his attention to the risky nature of the transaction and to the inadequacy of the profits in view of the risks run. The letter specifically stated: "Mr. Nocton has, as you know, a large financial interest in the property. We should accordingly strongly urge you before committing yourself definitely to anything further to obtain, in this particular matter, the advice of an entirely independent surveyor and independent solicitor." This advice the respondent did not entertain, and, after full warning and knowledge, continued to employ the appellant as his solicitor in subsequent transactions relating to the property.

In the autumn of the year 1905 the first block of the buildings, called Block A, was practically completed, and a lease was shortly afterwards granted to the builder at a ground rent of 1300*l.* per annum. A further block, Block B, was nearly finished, but the building of the remaining blocks had not been commenced. In order to complete Blocks A and B, and to erect buildings on the other blocks, it was necessary to raise further money. The appellant suggested that for this purpose Block A should be released from the mortgage to the respondent for 65,000*l.*, and by the Economic Life Assurance Society from the security on which they had advanced the sum of 75,000*l.* to the respondent. For this purpose negotiations were opened with the Economic Life Assurance Society, who instructed their surveyor, Mr. Robert Vigers, to inspect the property comprised in their security and report to the society. On December 1, 1905, Mr. Vigers

made his report, but this report was not seen by the appellant. On December 4, 1905, the following letter was written to the appellant's firm from the Economic Life Assurance Company:—

"Dear Sirs,

"*The Lord Ashburton.*

"I have now received a satisfactory report from Mr. Vigers, and I have to inform you, therefore, that we consent to the release of Block A from our security. I am accordingly advising our solicitors, and shall be glad if you will communicate with them.

"Yours faithfully,

"George Todd,

"Actuary and Secretary."

The release of Block A from the security of the Economic Life Assurance Society was accordingly carried through, but in order to make Block A available for raising further money it was also necessary that it should be released from the mortgage of 65,000*l.* held by the respondent. It is in respect of the release of this block from the mortgage of the respondent that the Court of Appeal have found that the charge of fraud against the appellant was established. On the other hand, Neville J. found that the conduct of the appellant throughout the whole transaction was not fraudulent, however foolish or lamentable. The charge of fraud against the appellant in connection with the release of Block A from the mortgage is mainly based on a letter written by him to the respondent on December 9, 1905. This letter states that for the purpose of financing the buildings upon the property it is necessary that Block A should be released from the mortgage, and that the Economic Life Assurance Society had agreed to release it from their mortgage. The letter contains the following passage: "The Economic Society sent their surveyor, Mr. Robert Vigers, to look at the property with a view to testing the security before they consented to release it. This I think you will agree with me, is very satisfactory."

It is not questioned that the release of the block from their security by the Economic Society depended on different considerations from the release of the block from the mortgage of the respondent. The Economic Society held, in addition to the

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mortgage on the property, other property of the respondent in Kensington, valued by Mr. Vigers at 52,400*l*. If the letter was intended to convey to the respondent that the report of Mr. Vigers to the Economic Life Assurance Society was a valuation that would justify the release by him of the block from the mortgage, it would be difficult to come to any other conclusion than that the appellant had made a fraudulent representation. In my opinion the letter does not necessarily amount to such a representation. It was written to the respondent, who was cognizant of the whole transaction, and was himself a joint speculator, although not expecting any greater profit than the difference in the rate of interest at which he borrowed and lent the sum of 65,000*l*., together with the bonus of 500*l*. The question of fraud cannot be determined apart from the oral evidence, and I am not prepared to differ from Neville J., who negatived the charge after hearing at length the evidence of both the appellant and the respondent, stating that, in his opinion, the evidence had fallen far short of proof of such a charge.

In coming to the conclusion, Neville J., in commenting on the evidence of the appellant, considered that the reckless statements by him were quite as much against his own interest as in favour of it, and did not find that he was deliberately intending to mislead the Court. He also found, as I think rightly, on the evidence, that the transaction impeached was known to the respondent quite as well as to the appellant, and that, although in giving advice he was actuated by the fact that he was personally interested, as was well known to the respondent, yet there was no conscious neglect of the respondent's interests and no intention to defraud him.

The question remains to be considered whether, in the absence of mens rea, the appellant is liable to the respondent. It is practically admitted that the appellant, in advising the respondent, did not use the skill and care required of a solicitor, and that in the transaction which resulted in the release of Block A from the mortgage he committed a breach of duty rendering him liable in negligence, quite apart from fraudulent intention. Neville J. stated his opinion that the appellant fell far short of the duty which he owed to the respondent as a

solicitor, and the Master of the Rolls says that, if the respondent had claimed damages on the ground of negligence, the action would have been practically undefended as to the part of the case not varied by statutory limitation. Neville J. held, however, after careful consideration of paragraphs 31 to 33 of the statement of claim, which have reference to the release of Block A, that fraud had been definitely alleged in connection with the whole story, and that he would not be acting with justice if he were to divide the case, and treat this part of the action as severable from the rest, and consider whether, on other grounds than the alleged ground of fraud, he should be right in giving relief against the appellant.

The same view was expressed in the Court of Appeal, but it was less material, since the Court of Appeal found fraud against the appellant. It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute-barred.

My Lords, the question therefore arises in a simple form, whether the pleadings sufficiently raise a charge of breach of duty irrespective of fraud or fraudulent intention. The answer depends on a consideration of paragraphs 31 to 33, read in connection with the terms of the declaration claimed by the respondent. Turning first to the claim, it deals with the whole transaction, and not separately with the release of Block A, and asks for a declaration that the respondent was improperly advised and instructed by the appellant whilst acting as his confidential solicitor to advance to Douglas and Holloway the sum of 65,000*l.* upon the security mentioned. The relevant paragraphs in the statement of claim are 31 to 33. Paragraphs 31 and 32 are narrative.

No doubt paragraph 33 does directly allege fraud in connection with the release of Block A, but if all the allegations directly imputing fraud are excluded, sufficient remains on which to found a charge of negligence for breach of duty of the appellant in his employment as a solicitor. It does not appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence for breach of

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duty. The same evidence would have been required whether the action had been founded on negligence or fraud, and the defence would have been conducted in either case on the same lines. My Lords, reference was made during the hearing in your Lordships' House to the case of *Derry* v. *Peek*. (1) That case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case in my opinion has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor.

My Lords, in my opinion the judgment of the Court of Appeal should be affirmed, but the appellant is absolved from the charge of fraud.

Order of the Court of Appeal affirmed and original and cross-appeals dismissed with costs, such costs to be set off.

Lords' Journals, June 19, 1914.

Solicitors for appellant: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Frederic Hall, Folkestone.*

Solicitor for respondent: *H. S. Knight Gregson.*

(1) 14 App. Cas. 337.

[HOUSE OF LORDS.]

HADSLEY . . . . . APPELLANT;

AND

DAYER-SMITH . . . . . RESPONDENT.

H. L. (E.)* 1914 *May* 5.

Covenant in Restraint of Trade—Construction—Breach—Business of House Agent—"Carrying on business."

The plaintiff and defendant formerly carried on the business of house agents in partnership under articles which provided that an outgoing partner should not for a period of ten years from the dissolution of the partnership carry on, or engage or be interested directly or indirectly in, any similar business within a radius of one mile from the partnership premises. The defendant withdrew from the partnership business and started a similar business on his own account at an office outside the prohibited radius. In the course of such business he endeavoured to let two houses within the prohibited radius, and he put up notice boards at these houses directing intending tenants to apply to him at his office and inserted advertisements of these intended lettings in a newspaper:—

Held, that these acts were a breach of the covenant, and an injunction granted.

Turner v. *Evans* (1853) 2 E. & B. 512 followed.

Dicta of Lord Atkinson and Lord Mersey in *Kirkwood* v. *Gadd* [1910] A. C. 422 explained and distinguished.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Eve J. on a motion for injunction.

In March, 1900, the respondent entered into partnership with the appellant in the business of auctioneers, house and estate agents and valuers for a term of twenty-one years from January 1, 1900, under articles of partnership dated March 24, 1900. Clause 29 of the articles provided as follows:—

"An outgoing retiring or expelled partner shall not nor in the event of the partnership property being realised under clause 26 shall either or any partner for the term of ten years from the time of the dissolution of partnership as aforesaid carry on or engage or be interested directly or indirectly either as principal or as servant or agent of another in any business of a nature similar to or competing or interfering with the business of the

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD PARMOOR.

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partnership or any part of such business within a radius of one mile from the premises of the said partnership."

The partnership business was carried on under the style of F. R. Hadsley & Co. at 15, Motcomb Street, Belgrave Square, for over twelve years.

On December 11, 1912, the respondent served on the appellant a notice expelling him from the partnership pursuant to clause 25 of the articles, and the partnership was dissolved as at that date.

In March, 1913, the appellant started a business on his own account as an auctioneer, house and estate agent and valuer under the style of F. R. Hadsley at 71, Duke Street, Grosvenor Square, which was just outside the prohibited radius of one mile from the partnership premises. In the course of such business the appellant endeavoured to let two houses situated within the prescribed area—a house in Wilson Crescent, Belgrave Square, and a house in Hill Street, Rutland Gate. At the request of the owners the appellant caused notice boards to be put up at the said houses directing intending tenants to apply to the appellant at 71, Duke Street, Grosvenor Square, and the appellant inserted advertisements of such intended lettings containing a similar direction in the *Morning Post* of March 27 and 29, 1913. The appellant also inserted an advertisement seeking to obtain a house within the prohibited area in the *Morning Post* of March 29, 1913, on behalf of a client who resided outside that area; and he claimed that none of these acts constituted a breach of the covenant in the partnership articles.

On April 1, 1913, the respondent commenced an action against the appellant, claiming, inter alia, an injunction in the terms of the covenant to restrain the appellant from carrying on business in breach of the articles, and moved for an interlocutory injunction.

Eve J. refused the motion. The Court of Appeal (Cozens-Hardy M.R., Kennedy L.J., and the President of the Probate, Divorce, and Admiralty Division) discharged this order and granted an injunction.

1914. May 4, 5. *Cozens-Hardy, K.C.*, and *Owen Thompson*, for the appellant. The business of a house agent is carried on where his office is. The acts complained of as having been done

within the prohibited area do not constitute a carrying on of the business. For the purposes of a covenant of this kind there is a distinction between carrying on a business and doing an act in the course of the business: *Woodbridge & Sons* v. *Bellamy*. (1) The covenant was intended to deal not with isolated business transactions but with the business of the whole. If the intention of the parties had been to prohibit the outgoing partner from doing any act usually done in the course of a house agent's business that could easily have been carried into effect by appropriate language. A man's business is carried on at his shop or office, and not the less so because some of the work may of necessity be done away from the shop or office: *Kirkwood* v. *Gadd*. (2) This view may seem to be inconsistent with *Turner* v. *Evans* (3), but that case has no application to the business of a house agent; it proceeded entirely on the footing that a wine merchant could carry on his business of selling wine at a profit without an office at all. To use the language of Knight Bruce L.J. in that case, the question is, Where is the essential act done? In the case of a house agent's business the essential act is the letting or selling on behalf of the client, and that act is done at the office.

Edward Clayton, K.C., and *W. Arnold Jolly*, for the respondent, were not called upon.

Lord Dunedin. My Lords, the appellant in this case was in partnership with the respondent, and carried on with him the business of a house agent. Under the partnership articles there were provisions for the partnership coming to an end, and for the partners retiring or, under certain circumstances, being expelled. The partnership so far as these two parties were concerned did come to an end. I use a neutral expression because I understand it is a matter of controversy, and is indeed being litigated at this moment, whether the way in which the partnership came to an end was by expulsion or retirement; but for the purposes of the question we are engaged upon it matters not, because the 29th article of the articles of partnership was in these terms: "An outgoing retiring or expelled partner" (and

(1) [1911] 1 Ch. 326, at p. 339. (2) [1910] A. C. 422, at pp. 432, 438.
(3) (1852) 2 D. M. & G. 740; (1853) 2 E. & B. 512.

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it is certain that the appellant comes within one or other of those designations) "shall not nor in the event of the partnership property being realised under clause 26 shall either or any partner for the term of ten years from the time of the dissolution of partnership as aforesaid carry on or engage or be interested directly or indirectly either as principal or as servant or agent of another in any business of a nature similar to or competing or interfering with the business of the partnership or any part of such business within a radius of one mile from the premises of the said partnership."

Now, my Lords, the premises of the partnership were somewhere in Motcomb Street, Belgravia. The appellant set up business for himself in Duke Street, Grosvenor Square, and it is admitted that Duke Street is at a distance of more than one mile from Motcomb Street. When there he inserted in the *Morning Post* two advertisements as regards houses to be let in Wilton Crescent, Wilton Crescent being in close proximity to Motcomb Street, and another in Hill Street, Rutland Gate, which is admitted to be within a mile of Motcomb Street; and he also put up on the houses which were so designated to be let, a board on which was painted the words that the house was to let, and in which reference was made, for intending takers, to his address in Duke Street, Grosvenor Square. Upon that the respondent applied for an injunction against the appellant acting in a way inconsistent with the covenant contained in article 29; that injunction has been granted by the Court of Appeal in terms which are an echo of article 29; and the appeal to your Lordships' House has been in order to say that the decision which the Court of Appeal came to was wrong.

My Lords, I am of opinion that the decision which the Court of Appeal came to was quite right, and I agree with the reasons that are given by the learned judges in their judgments. I think that the case as a matter of fact is really practically indistinguishable from the old case of *Turner* (1), which was quoted, and the case which came as a sequel to *Turner's Case* (1) of *Brampton* v. *Beddoes*. (2) I think the true criterion is given in *Turner's Case*. (1) The point is to discover, by looking at the whole contract

(1) 2 E. & B. 512. (2) (1863) 13 C. B. (N.S.) 538.

and the clause which says that certain things are not to be done, what is the true object of the prohibition. I think, treating the contract in that way, the true object of the prohibition here was undoubtedly to prevent competition in the business of a house agent. It seems to me that when a person does those acts which I have mentioned here as having been done by the appellant he is entering into competition with his old firm in the radius.

My Lords, Mr. Cozens-Hardy in his very clear argument urged that the business could only be carried on at Duke Street and nowhere else. I do not think that that is a practical way of looking at a house agent's business.

My Lords, certain references were made to certain dicta of noble Lords in this House in the case of *Kirkwood* v. *Gadd*. (1) It is a trite saying, my Lords, that all dicta of noble Lords or of any other judges must always be taken secundum subjectam materiam. The point in *Kirkwood's Case* (1) was to find what was the mischief which the Legislature had prohibited when it said that a money-lender should only carry on his business at his registered address, and it was held that his doing certain acts incidental to his business at other places did not contravene that prohibition. My Lords, I do not think that remarks made in the course of examining that question can be taken and applied to the question of determining what is the true meaning of the covenant here. When you take the covenant here it leaves, I must say, no doubt in my mind that the substance of the matter is, has what the appellant has done been an act of real competition with his old firm within the prohibited area? I think it has; and accordingly I move your Lordships that the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur, and I have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, in cases of restrictive covenants such as the present, whether occurring in partnership agreements or in contracts for the sale of goodwill, one has to consider (1.) the substance of the bargain between the parties and (2.) the nature of the business with regard to which the contract was made.

In my opinion the substance of the bargain between these

(1) [1910] A. C. 422.

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parties had reference to a possible rivalry by a partner expelled from, or leaving, the business, the partnership wherein was dissolved. The words appear to me to aim at that thing, and that thing substantially. Within a definite circle of two miles diameter, in the west end of London, the expelled partner is not "to carry on or engage or be interested directly or indirectly in any business of a nature similar to or competing or interfering with the business of the then existing partnership."

My Lords, that being my view of the substance of the bargain, I ask myself what was the nature of the business? It was a house selling or a house letting agency. The argument presented is that houses within the prohibited area may be let or sold by the appellant, that he may advertise for houses there, that he may placard houses there as for lease or sale by him as agent and that all this may be done systematically and as part of his regular business without contravening the restrictive covenant, if only his business address—the head office so to speak of this undertaking—be located just outside the prohibited circle. I am not putting the argument extremely, my Lords. It was presented thus to your Lordships just as it was to the Court of Appeal, and I entirely agree with the judgment of the Court of Appeal upon it.

I think such a construction of this contract is much too narrow. I venture to express my adherence to the view stated by the President of the Admiralty Division when he interprets the words "carrying on . . . . business" occurring in this contract as really meaning "continuing the advertising, purchasing, letting, hiring or selling of similar houses, in a word, continuing the ordinary acts of the business of a house agent within the area of prohibition." It appears to me, my Lords, that that is the good sense of the situation, and that that interpretation accords with the intention of the parties. I should have said so had the words "carrying on" the business stood alone, but when to that were added the terms "engaging in" and "being interested directly or indirectly in" a rival business within the prohibited area, for the prohibited time, the construction is amply confirmed.

My Lords, I agree with my noble and learned friend on the woolsack that the principle of *Turner* v. *Evans* (1) applies in this

(1) 2 E. & B. 512.

case. The term "carrying on of the business" must of course be a flexible term, having in view the nature of the business to be carried on, and the particular acts done. A useful help in the interpretation of this contract is by way of considering what the opposite view leads to. It leads to this, that the appellant's whole business might continue to be the selling or letting of houses within the prohibited area, that he would draw his entire income from commissions on these transactions within the prohibited area, but that this would be permitted, according to his construction of the contract, if his office was a yard beyond. My Lords, I reject a construction which has these absurd results and is not in accordance with ordinary rules of honesty.

I agree.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. My Lords, I concur, but I should like to say one word in reference to the judgment of Eve J., on which the able argument of Mr. Cozens-Hardy was founded. The case depends on the construction of article 29 of the partnership agreement. Mr. Cozens-Hardy's contention was that the only matter that was prohibited under the words of article 29 was the establishment of a business within the prohibited area, and Eve J., who adopted that construction, read in the word "establishment" after the word "business" and before the words "within a radius of one mile from the premises of the said partnership." If the covenant in question could be so construed, I should have agreed with the judgment of Eve J. and the argument of Mr. Cozens-Hardy, but I think that it cannot be so construed, and that it has the wider sense that has been already put before your Lordships' House. I agree that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 5, 1914.

Solicitors for appellant: *Spyer & Sons.*

Solicitors for respondent: *Morgan & Upjohn.*

[PRIVY COUNCIL.]

J. C.*
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June 17;
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WEST INDIA ELECTRIC COMPANY, LIMITED . . . . . } Appellants;

AND

MAYOR AND COUNCIL OF KINGSTON . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Jamaica—Tramway Company—Compulsory Purchase of Land—Necessary for working Tramways—Dwellings for Inspectors—Tramways Law (No. 27 of 1895), s. 9.

The provision by a tramway company in Jamaica of dwellings and a recreation ground for its European inspectors is not "a work necessary for the working of the tramways" within the meaning of the Tramways Law, 1895, s. 9; the company consequently cannot compulsorily acquire land for that purpose under the provisions of the above-mentioned section.

Appeal from a judgment of the Supreme Court of Jamaica (September 11, 1913) affirming the decision of Beard J. (April 11, 1913).

The appellants were a company incorporated in Jamaica by an Act of 1897, as amended by an Act of 1898, and, under the provisions of a licence granted in pursuance of the Tramways Law, 1895 (of Jamaica), had constructed and were operating a system of tramways in Kingston. Under s. 9 of that Act the Governor had power to grant to the appellants compulsory power to acquire land "in case the construction of the tramway, or any works or building necessary for the working thereof pursuant to the terms of the licence granted," involved its acquisition. The objects for which the appellants were incorporated and the terms of the licence, so far as material, appear from the judgment of their Lordships.

In 1910 the appellants determined to establish a system of European traffic inspectors, who should dwell in suitable houses near the appellants' offices and works. They accordingly purchased by private agreement certain land known as Oxford Pen

* *Present:* Lord Dunedin, Lord Atkinson, Lord Sumner, and Sir Joshua Williams.

and erected houses upon it, part of the land being reserved for a recreation ground for the inspectors.

The respondents in 1912 required part of the land used as a recreation ground for the purpose of making a street, and they accordingly served upon the appellants a notice to treat under s. 36 of the Parochial Boards Laws Consolidation Law (No. 17 of 1901), and issued a plaint for the assessment of the compensation to be paid to the appellants.

The appellants thereupon commenced the present proceedings, claiming an injunction to restrain the respondents from proceeding further upon the notice and plaint. They applied by summons for an interim injunction and filed evidence to the effect that the efficient working of the tramways required that inspectors should be employed and should be located near their offices and works, and that Oxford Pen was the only suitable site available. They contended that, though the land had been purchased by agreement, their compulsory powers of purchase extended to its acquisition, and that the compulsory powers of the respondents as to purchase of land consequently did not apply to it.

The summons, which was treated as the trial of the action, was heard by Beard J. and was dismissed. The Full Court of the Supreme Court dismissed an appeal by the present appellants.

Sir R. Finlay, K.C., and *J. G. Archibald*, for the appellants. The land sought to be acquired by the respondents was purchased by the appellants for purposes which were incidental to the efficient operation of the tramways, and it is used for those purposes as part of their undertaking. Having regard to the objects specified in the Act of incorporation and in the licence, the land was upon the evidence necessary for the working of the tramways within the meaning of s. 9 of the Tramways Act, 1895. On the true construction of the Parochial Boards Laws Consolidation Law, 1901, the respondents had no power to acquire compulsorily land which belongs to and could have been acquired compulsorily by another person or corporation.

Charles, K.C., and *E. Bligh*, for the respondents, were not called upon.

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The judgment of their Lordships was delivered by

LORD SUMNER. On June 28, 1912, the Mayor and Council of Kingston, Jamaica, as the local authority, having previously caused the appellants, the West India Electric Company, Limited, to be served with notice to treat under s. 36 of the Parochial Boards Laws Consolidation Law (No. 17 of 1901), issued a plaint in the Kingston Court for assessment of compensation to be paid for taking a small portion of Oxford Pen, a piece of land which belongs to the appellants. Thereupon the appellants began the present action, in which they claimed an injunction to restrain the respondents from acquiring the site in question, and from proceeding further with the plaint. The hearing of a summons for an interim injunction was, by consent, treated as the trial of the cause, and the action was dismissed. An appeal was unsuccassfully taken, and the case now comes before their Lordships on appeal from the Supreme Court of Jamaica.

It is admitted that, as against a private owner or a company not possessed of any compulsory power of taking land, the proceedings of the respondents were competent and regular. The appellants seek to distinguish their position in respect of the land in question from that of private owners, and the burden is upon them to do so. They affirm that, in respect of the site, they were in a position to have acquired it under compulsory powers prior to the respondents' notice to treat; that they can be in no lower or worse position merely because they bought it by private treaty; and that, in a competition between their compulsory powers and those of the respondents, priority must be given to those first exercised, as they claim that in substance their powers must be deemed to have been, and hence that it would be inequitable and unlawful for the respondents to seek to take from them by compulsion what they must be treated as having previously taken from others compulsorily for the purpose of their undertaking and in exercise of their statutory powers as undertakers.

The substantial question on this appeal is whether the appellants had any compulsory powers of taking the site in question, if they had chosen to exercise them. It may be conceded for present purposes that they are not prejudiced by having bought the land

as a voluntary transaction of purchase and sale, when they might have acquired it by compulsion on paying an assessed compensation for it, without inquiring whether there are any and, if so, what cases in which this proposition would not hold good. It may be conceded further, and similarly without further inquiry, that for the purposes of this case it is true that, if the land had been acquired compulsorily by the appellants, the respondents had thereafter no power to take it away under their statutory compulsory powers.

The appellants are a company which among other things works the electric tramways of Kingston. The board of directors decided that it was necessary to employ a staff of European inspectors for the regulation of the tramways. In tropical conditions such a staff required special housing accommodation, airy and spacious, quiet and attractive, with sufficient room for recreation and exercise. Accordingly the company bought a site of considerable size, called Oxford Pen, in a convenient position. Part of this is occupied by residences, part is used as a common recreation ground. It is a strip, only thirty-three feet wide, at the extremity of this site furthest from the houses and at the bottom of the garden that the local authority proposes to cut off in order to make a new road over it.

There is no question that the purchase and user of Oxford Pen are intra vires the appellant company, but whether the acquisition of it for such a user would have been within its compulsory powers is a very different matter. Sect. 5 of the Kingston and St. Andrew's Tramways Licence, 1897, is as follows: "Subject to section 9 of the Tramways Law, 1895, the provisions of the Lands Clauses Law, 1872, except sections 84 and 88, are hereby incorporated with this licence."

It is not necessary to set out the provisions of the Lands Clauses Law, 1872, above referred to; they are of a familiar type, and would suffice in themselves for the acquisition of Oxford Pen, if applicable. Sect. 9 of the Tramways Law, 1895, is as follows, so far as is material: "In case the construction of any tramway, or of any works or building necessary for the working thereof pursuant to the terms of the licence granted, involves the acquisition of any land adjacent to any street or road and

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extending to a distance not exceeding 150 feet from the roadway, it shall be lawful for the Governor in Privy Council, in and by the licence, or at any time subsequent to the granting thereof, to grant to the applicants compulsory power to acquire any such land."

Oxford Pen was adjacent to two roads, and no part of it was distant more than 150 feet from one or other of them.

The appellants were incorporated as a company in Jamaica by Law 33 of 1897, which was afterwards amended by Law 38 of 1898. Among the objects specified by s. 2 of the former Act, for which the company was incorporated, are "the construction, acquiring, maintaining, and operating an electric tramway . . . . including power houses, factories, stations, and laboratories in connection therewith, and the doing of all things reasonably necessary or incidental to the attainment of such objects," and by clause 6 of the licence it was made obligatory on the company "to construct . . . . maintain . . . . and operate all the tramways" therein described "with all . . . . necessary and convenient . . . . buildings . . . . for the due and efficient working of the said tramways . . . . ," and it was further provided as follows: "generally the licensees shall do and execute all and any other works necessary for the efficient construction, operation, and equipment of the tramways."

Their Lordships are of opinion that under these provisions the exercise of compulsory powers of acquiring land is subject always to the words of s. 9 of the Tramways Law, 1895, and that it must be shewn that the acquisition of the land to be taken is involved in and by the construction of buildings necessary for the working of the tramway, pursuant to the terms of the licence. This has not been shewn. The erection of houses or the adaptation of existing houses for the use of European inspectors was no doubt a proceeding on the part of the company at once enlightened and humane, and was doubtless beneficial to the company and calculated to promote the efficient and profitable working of its tramways, but it was in no sense necessary for the working, unless the word is to be stretched until it becomes merely a synonym for convenient or advantageous. Neither do the words "working of the tramway pursuant to the terms of the licence"

assist the appellants' argument, for the terms of the licence, which impose obligations with regard to the working of the tramway, deal with things to be done to maintain the efficiency of the tramway and not the efficiency of the tramway company's servants. The fact that the company is empowered to "do all things . . . . reasonably necessary or incidental to the attainment of " the object, inter alia, of operating the tramways does not enlarge the area of that necessity for the working, which is the test of the application of the compulsory powers given by the Act of 1895 and the licence of 1897.

The appellants, however, contended that a new and less limited power to take land by compulsion was given by the Law No. 38 of 1898, s. 3 of which runs as follows: "The provisions of the Lands Clauses Law, 1872, (Law 26), except sections 84, 88, 104, 105, and 106, are incorporated with the company's special law in respect of undertakings of the company under any law or any licence approved by the Governor in Privy Council."

This section, unlike s. 9 of Law 27 of 1895, contains no words such as "in case the construction of any tramway or of any works or building necessary for the working thereof . . . . involves the acquisition of land." From this it was inferred that Law No. 38 of 1898 conferred compulsory powers of acquiring land in furtherance of all or any of the objects of the company and particularly of "the doing of all things reasonably necessary or incidental to" the operating of the tramways. Their Lordships are unable to accept this inference. As appears from s. 2 of Law 26 of 1872, which is the definition section, "the company's special law," with which Law 38 of 1898 effects an incorporation of parts of the Lands Clauses Law, is Law 33 of 1897, and the incorporation is, so far as the tramway system is concerned, "in respect of undertakings of the company under any licence approved by the Governor in Privy Council," that is, the Kingston and St. Andrew's Tramways Licence, 1897. That licence by s. 5 incorporates a larger part of that Lands Clauses Law, but does so "subject to section 9 of the Tramways Law, 1895." So far, therefore, from repealing or annulling these words, the Law of 1898, which is some months later in date than the licence, subjects the incorporation which it effects, "in respect of

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undertakings of the company under" the licence, to them. The whole licence must be read as one, that is, as though the incorporation effected by the Law of 1898 had been written into it, and then all the powers of compulsory acquisition which the company enjoys in respect of the Kingston tramways undertaking are subject to and prefaced by that reference to the Tramways Law of 1895, which makes necessity for the working of the tramways the touchstone of the right to take land by compulsion.

Their Lordships are accordingly of opinion that the order appealed from was right, and will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Biddle, Thorne, Welsford & Gait.*

[PRIVY COUNCIL.]

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CITY OF HALIFAX . . . . . APPELLANTS;

AND

NOVA SCOTIA CAR WORKS, LIMITED. . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Municipal Taxation — Sewers — Cost of laying — "Total exemption from taxation" — Construction — Halifax City Charter.

Under an agreement with the appellant corporation, specially sanctioned by the Legislature, the respondents were entitled to "a total exemption from taxation," for ten years, upon its land and buildings situated in the city. The appellant corporation had power under its charter to raise money by assessment for the general purposes of the city; the charter also provided that owners of property fronting upon any sewer laid by the corporation should contribute to the cost of its construction according to their frontage:—

Held, that the contribution imposed by the charter in respect of laying sewers was "taxation" within the meaning of the agreement, and that the respondents were accordingly exempt from liability in respect thereof.

APPEAL by special leave from a judgment of the Supreme Court of Canada (March 13, 1913) reversing a judgment of the

* *Present:* VISCOUNT HALDANE L.C., LORD MOULTON, and LORD SUMNER.

Supreme Court of Nova Scotia (May 10, 1912) upon a case stated by agreement.

The appellant corporation derived its powers from the Halifax City Charter, which came into force in 1907 by proclamation of the Provincial Governor in Council.

The respondents were a company formed in 1911 to acquire the business and property of the Silliker Car Company, Limited, the business being the manufacture of railway cars in Halifax.

In order to encourage this industry in Halifax the appellant corporation, by an agreement made in 1907, granted to that company "a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated." The material part of the agreement is fully set out in the judgment of their Lordships. This agreement, which went beyond the powers as to exemption contained in the city charter, was specially confirmed by the Statutes of Nova Scotia, 1907, c. 70, s. 4.

The Halifax City Charter by Part V. (ss. 333—486), under the heading "Taxation," authorized the appellant corporation to raise money by assessment for the general purposes of the city and for a water supply. Sect. 334 provided that all real and personal property within the city, subject to the exemptions in s. 335, should be subject to the taxation provided by the Act. Sect. 335, among various exemptions, included property of any person or corporation exempted from civic taxation under any special Act. Sect. 344 provided that the corporation might exempt land and buildings intended for the establishment of any manufacturing industry from taxation for the general purposes of the city, other than water rates, for ten years. Sect. 600, which formed part of a group of sections headed "City Works and Property," provided that when any public sewer was built in any street the owners of property fronting on the sewer should be liable to pay to the city, towards the cost of construction of such sewer, the sum of $1.25 for each lineal foot of his property so fronting, and that the remainder of the cost of construction should be borne by the city. The appellant corporation constructed public sewers along streets upon which the respondents' land and buildings fronted and subsequently claimed from them

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$2387 as the proportion of the cost for which they were liable under s. 600.

Upon a case stated by agreement, the Supreme Court of Nova Scotia held that the agreement did not apply to the cost of constructing sewers, and that the respondents were liable.

The Supreme Court of Canada (Idington, Duff, Anglin, and Brodeur JJ., Sir Charles Fitzpatrick C.J. dissenting) reversed this decision and held that the respondents were exempted.

Upon the argument before the Judicial Committee it was agreed that the question of liability in the present case was not affected by a special Act (Statutes of Nova Scotia, 1911, c. 41) exempting the respondents from city rates and taxes.

Sir R. Finlay, K.C., F. H. Bell, K.C., and *Geoffrey Lawrence*, for the appellants. The respondents' liability to contribute to the cost of laying sewers is not "taxation" within the meaning of the agreement for exemption. The city charter, to which reference must be made to ascertain the scope of the exemption, under the heading "Taxation" does not deal with the laying of sewers, and contemplates as taxation only the levying of rates by assessment upon property generally. The liability to contribute to the cost of sewers arises only under s. 600, and is of the nature of reimbursement to the corporation for work done for the special benefit of the frontagers concerned. The decision in *La Cité de Montréal* v. *Les Ecclésiastiques du Seminaire de S. Sulpice de Montréal* (1) is distinguishable, as in that case the exemption was within the general power to grant exemptions contained in the charter: Stat. of Quebec, 41 Vict. c. 6, s. 26. Although in that case special leave to appeal was refused, the Judicial Committee cannot be taken as having affirmed the decision. Questions similar to the present have arisen in the United States and the decisions therein support the appellants' contention: *Illinois Central Railway* v. *Decatur* (2); *Ford* v. *Delta and Pine Land Co.* (3) The decision in *Harvard College* v. *City of Boston* (4), referred to

(1) (1889) 16 Can. S. C. R. 399; (1889) 14 App. Cas. 660.
(2) (1892) 147 U. S. 190.
(3) (1896) 164 U. S. 662.
(4) (1870) 104 Mass. 470.

by Anglin J., was commented on in *Boston Seamen's Friend Society* v. *Mayor of Boston*. (1)

P. O. Lawrence, K.C., and *E. P. Allison, K.C.*, for the respondents. The respondents are exempt under the agreement. The word "taxation" is used in the agreement in its ordinary sense, and includes any compulsory levying of money by a public authority for public purposes. The method by which the money is levied, whether by assessment or otherwise, is not material. The liability to contribute is none the less "taxation" because a special benefit is conferred upon the particular persons taxed: *Montréal Case*. (2) The authorities in the United States depend upon the Fourteenth Amendment of the Constitution of the United States and are not applicable to the present case.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

LORD SUMNER. The respondents own a manufactory in Halifax, Nova Scotia, situated on four streets. In 1908, 1910, and 1911 the city of Halifax made public sewers in these streets under the city charter, and under its 600th section required the respondents, as owners of land and buildings fronting the sewers, to pay $2387.34 towards the cost of their construction. If the respondents are in the position of an ordinary ratepayer, that sum is due and constitutes a lien on their lands under s. 603 of the charter. The question is, in the words of paragraph 15 of the case stated for the opinion of the Supreme Court of Nova Scotia, "does the exemption claimed by the defendant apply in respect to the sewers," or, put in another form, is this charge "taxation on the company's buildings . . . . and on the land on which its buildings used for manufacturing purposes are situated?"

The Silliker Car Company was incorporated in 1907. The Nova Scotia Car Works, Limited, now respondents, are assignees of its manufactory and entitled to its rights and exemptions. For present purposes no distinction need be drawn between them. Both alike may be referred to as "the company." The city of Halifax has power, under s. 344 (1.) of its charter, "when

(1) (1874) 116 Mass. 181. (2) 16 Can. S. C. R. 399; 14 App. Cas. 660.

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any company proposes to purchase any land or erect any building in the city of Halifax for the purpose of establishing any manufacturing industry," to "wholly or in part exempt the land and buildings . . . . of such company from taxation for the general purposes of the city other than water rates for a period not to exceed ten years from the establishment of such industry." The company did propose to purchase land and erect buildings, but the city of Halifax was minded to do more than merely to apply this section, and an agreement was negotiated between the city and the company, which, in the form of a schedule to a special Act, received legislative sanction on April 25, 1907. Under this agreement and the Act the city was to lend the company $125,000, to grant it an exemption from taxation for ten years, and to limit the yearly assessable value of its property during the second ten years to an agreed sum. As the consideration for this assistance the company agreed to establish a manufactory in Halifax, and this has been done.

The actual terms of the exemption thus specially enacted are as follows: "The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated . . . . At the expiry of the ten years the city agrees that the total yearly value for assessment on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company, which shall be charged at the minimum rate charged other manufacturing concerns."

So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing pro tanto the burthen on the others.

In the case of *La Cité de Montréal* v. *Les Ecclésiastiques du Seminaire de S. Sulpice de Montréal* (1) Lord Watson, speaking of an exemption from "municipal and school taxes," or "cotisations municipales et scolaires," says of a district rate for drainage improvements, "prima facie their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes." It will be observed that this was a case of exempting a certain class of ratepaying bodies, namely, educational institutions, on public grounds. Hence what Lord Watson says applies a fortiori in the present case of a particular bargain. It is true that all that was decided by that judgment was that leave to appeal should not be given, but their Lordships had taken time to consider it, and this dictum, given in the course of it, is of great weight in the present case.

But apart from this their Lordships think that prima facie the exemption covers the charge in question. Put shortly, the appellants' argument must be, this liability "to pay to the city, towards the cost of construction of such sewer, the sum of one dollar and twenty-five cents for each lineal foot of property so fronting" is not "taxation on buildings or on the land" on which the buildings are situated. If it is not taxation, what else is it? No doubt other words may be found to describe it aptly, but the word "taxation" covers it too. Even in England, where the expression "rates and taxes" sometimes is used as if it connoted the distinction between national and local imposts, "tax" and "taxation" are words familiarly used in this connection. The Sewers Act, 1841, for example, authorizes commissioners of sewers to levy a "general sewers tax" for construction and upkeep of sewers, and this tax is included with other taxes and with rates in the returns required by the Local Taxation Returns Acts, 1860 and 1870.

It is, therefore, incumbent upon the appellants to rebut this presumption, and to limit this exemption so that the liability in question will fall outside it. Three things are relied on—the nature of the charge, the terms of the charter, and the context of the clause.

In a sense it is true that the charge resembles the price of

(1) 14 App. Cas. at p. 663.

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benefits conferred if not of work and labour done. The contribution is kept down to $1.25 per foot of frontage apparently to discriminate between the local benefit to property owners in the street and the general benefit to the city at large. This does not carry the matter far. All rates and taxes are supposed to be expended for the benefit of those who pay them, and some really are so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except in so far as representative government operates by the consent of the governed. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same. There is not enough here to differentiate this charge from "taxation."

What is relied on in the terms of the charter is that, alike in the headings of parts of the Act, in the arrangement of the sections themselves, and in the language employed, the charter seems to distinguish between "taxation" and the "execution of city works"; that "taxation" is a matter of valuation, assessment, and rate-books, and is subject to exemptions in favour of the Crown and of those who enjoy the benefit of grants of exemption from the city or exemption by special Act, while the execution of works of sewerage is treated as a specific city service, and is followed by an apportionment by the city engineer, not by the assessors, which is in proportion to linear frontage and not based on annual value. Its cost is a capital and not a recurring charge, and the remedies given are to be pursued in the like manner as remedies for rates and taxes, as though the charge was not either a rate or a tax, but only like them. Many sections were invoked as shewing this contrast; they do shew it and need not be enumerated here.

Their Lordships are by no means satisfied that criticism of this sort would suffice to rebut the prima facie meaning of "taxation." The arrangement of the sections and the headings of the different parts of the Act are matters of orderly arrangement and convenience not directed to the present point but

adopted alio intuitu. The charge is a capital instead of being a recurring charge, not because it is not a tax but because it is not a recurring tax; for a sewer, if once well laid, should last some considerable time. To say that the charge may be enforced as taxes are enforced is a condensed reference to procedure without necessarily meaning that the charge is not a tax but only something like it. There is, however, another short answer to this kind of reasoning. The agreement scheduled to the special Act does not expressly refer to the charter, nor is any such reference implied or involved. It provides for help to the company much beyond what the charter provided for. It is really independent of the charter. The company is not to pay any taxes at all; what does it matter, for the purpose of the exempting agreement, what powers the city has, or when, or how, or in what terms they can be exercised? The company has nothing to do with them; why should its privilege, for which it has given the agreed consideration, be limited by reference to powers and provisions which cannot be used to its prejudice? Reference to the charter would only be necessary if the agreement had bound the company to pay such taxes as the city might lawfully impose.

The third point turns on the latter words of the clause of exemption. First, limiting the annual valuation to $50,000 during the second ten years is supposed to shew that the exemption during the first ten was merely such as might have been effected by saying that the annual valuation on which the company should be taxed should be nil. Their Lordships can only say that this argument seems too shadowy to be of any service. In fact, the provision for the second ten years may not amount to an effective exemption at all. Secondly, the exemption is not to apply to ordinary water rates for fire protection or to the rates for water used by the company. These words are quite consistent with a wide sense of "taxation." These two rates can only be taken out of the exemption by naming them. How does naming them shew that the exempted taxation is ejusdem generis with water rates alone? If the exemption enjoyed by the company had been only one which the charter empowered the city to grant by s. 344, or only that which is referred

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to in s. 335, it would by s. 362 (3.) have stopped short of exempting it from charges for sewers or other betterments, but it is an exemption under a special Act, and the charter anticipates that such exemptions may occur, and provides ex abundanti cautela that among things wholly free from taxation shall be (s. 335 (1.) (*i*)) "the property of any corporation exempted from civic taxation under any special Act as therein provided." Accordingly it is the provision in the special Act, that is in this case the clause in the agreement scheduled to the special Act, that must govern. That clause simply provides that the company is to be exempt from taxation and is to pay water rates, not that it is to pay water rates but no other taxation.

Their Lordships are of opinion that these considerations do not, either singly or in the aggregate, meet the prima facie meaning of the words of exemption, and that taken as they stand they cover the liability in dispute. They therefore think that the Supreme Court of Nova Scotia was wrong in answering the question put in the case stated in the negative, and that the order appealed from, namely, that of the Supreme Court of Canada which reversed that decision and answered the question in the affirmative, was right and should be affirmed. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Lumley & Lumley.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

COMMISSIONER OF TAXES . . . . . APPELLANT;

AND

THE MELBOURNE TRUST, LIMITED . . RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (*Victoria*)—*Revenue*—*Income Tax*—*Company formed to realize Assets*—*Profits of Company*—*Income Tax Act*, 1903 (*No.* 1819, *State of Victoria*), *s.* 9, *sub-s.* 1.

The respondents were a company formed in 1903 to take over, nurse, develop, and realize the assets of three other companies, which had taken over and partially realized and distributed the respective assets of three Australian banks in liquidation. Payment was made for the assets by the allotment to the three companies of debenture stock and paid-up shares in the respondent company, the amounts allotted being in accordance with the values of the assets in the books of the three companies. The respondents from time to time sold a large part of the assets, including assets in Victoria, at prices which shewed a surplus over the purchase prices. By October, 1909, they had paid off, or bought in the market (partly below the face value), the whole of the debenture stock; in May, 1910, they paid a bonus of 6*d.* per share to the shareholders, and in August, 1910, they distributed debenture stock at the rate of 3*s.* 4*d.* per share. The articles of association provided that no dividend should be paid except out of profits. The Income Tax Act, 1903, s. 9, sub-s. 1, provides that "so far as regards any company liable to pay tax, the income thereof chargeable with tax shall . . . . be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment":—

Held, that the surplus realized by the respondents over the purchase prices paid for the assets sold, after making all just deductions, was profit taxable as income in the following year; (2.) that the respondents were entitled to hold in suspense part of the surplus realized to meet possible losses on other assets, and that under the circumstances the profit was earned, for the purposes of the Act, when distributed to the shareholders; (3.) that the amount of the bonus and the pecuniary value of the debenture stock distributed, so far as they were earned in or derived from Victoria, were taxable as profits under the above Act.

APPEAL by special leave from a judgment of the High Court of Australia (October 14, 1912) reversing a judgment of the Supreme Court of Victoria (June 4, 1912).

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOSHUA WILLIAMS, and SIR ARTHUR CHANNELL.

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Special case stated raising the question whether two assessments of 104,782*l.* and 509*l.* made upon the respondents were as to either of them rightly made as being profits earned in or derived from Victoria by the respondents within the meaning of s. 9 of the Income Tax Act, 1903 (No. 1819 of the State of Victoria), so as to subject the respondents to liability for income tax under that Act in respect thereof.

The assessment of 104,782*l.* was in respect of the surplus amount realized by the respondents upon the sale of certain assets which they had been incorporated to acquire, nurse, and realize, after deducting the valuation prices at which they acquired them. The circumstances under which the assets were acquired and sold appear fully from the judgment of their Lordships. The assessment of 509*l.* was in respect of the amount below the face value at which the respondents had bought in the market certain of their own debenture stock.

The assessments were objected to by the respondents, and a special case was stated between the parties.

The special case was referred to the Full Court of the Supreme Court of Victoria, which by a majority decided in favour of the present appellant. The Court (Hood and a'Beckett JJ., Madden J. dissenting) held that the respondents were incorporated with the object of selling the assets acquired and, if possible, making a profit for the benefit of the shareholders; that it was immaterial that the creditors of the banks could never be paid in full; that, under these circumstances, the surplus realized was liable to income tax as profits earned. Madden C.J., in dissenting, was of opinion that the three vendor companies were a mere agency or device for realizing the assets for the benefit of the banks' customers, and that the respondents were an amalgamation of the three companies, standing in the same position as they did, and that there could be no profits liable to income tax until the shareholders had received an amount equal to the indebtedness of the banks to their creditors. Upon appeal to the High Court of Australia, Griffith C.J. and Barton J. took a similar view to that held by Madden C.J., while Isaacs J. concurred with the view of Hood J. and a'Beckett J. The appeal was accordingly allowed by a majority of two to one.

The proceedings in the High Court are reported at 15 C. L. R. 274, where the special case is set out in full.

Sir R. Finlay, K.C., *Micklethwait*, and *W. Barton*, for the appellants. The respondents were carrying on a trade or business in the interest of their shareholders, and the amounts at which they were assessed were profits arising therefrom and are taxable: *California Copper Syndicate* v. *Harris.* (1) The decision in *Hudson Bay Co.* v. *Stevens* (2) is distinguishable, because in that case the profit was made by the sale of land which was held as an investment. The only business carried on by the respondents was that of realizing their assets, and the assets cannot be regarded as an investment held by them otherwise than for the purpose of making profits; the assets were, in effect, the respondents' stock in trade. The legal position of the respondents and their shareholders cannot be affected by circumstances which took place prior to the respondents' incorporation. [*Gresham Life Assurance Society* v. *Styles* (3) and *London County Council* v. *Attorney-General* (4) were also referred to.]

Clauson, K.C., and *A. M. Latter*, for the respondents. The sums assessed are not income within the meaning of the Income Tax Acts of Victoria, or in any other sense: *Hudson Bay Co.* v. *Stevens.* (2) There was no proof that any profit was made during 1909, the year of assessment. The difference between the estimated value contained in the books of the vendor companies and the prices realized by the sales, which extended from 1903 to 1909, is not profit, nor does it furnish material from which the profits for 1909 can be calculated: *Assets Co.* v. *Forbes.* (5) The respondents were, in effect, an amalgamation of the three vendor companies, to carry on the liquidation of the assets on behalf of the creditors. They were not trading in the assets for the purpose of making profits for the shareholders. The assets taken over were less in value than the amount due to the banks' creditors, and profits could therefore

(1) (1904) 6 F. 894; 5 Tax Cases, 159.
(2) (1909) 5 Tax Cases, 424.
(3) [1892] A. C. 309.
(4) [1901] A. C. 26.
(5) (1897) 3 Tax Cases, 542.

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never arise: *New York Life Insurance Co.* v. *Styles* (1); *Webb* v. *Australian Deposit and Mortgage Bank* (2); *Tebrau (Johore) Rubber Syndicate* v. *Farmer*. (3) In any case until the whole of the assets have been sold it is premature to say whether there is a profit; there may be heavy losses upon those which are at present unsold.

Micklethwait in reply. The cost price of the assets may be taken at the valuation in the companies' books, because the respondents paid for them upon that basis: *Assets Co.* v. *Forbes*. (4) The income tax is assessable annually, and the respondents are not entitled to claim that there shall be no assessment until the whole of the assets have been sold. The view that the respondents can be treated as merely liquidating the assets on behalf of the banks' creditors is untenable; the respondents had power under their memorandum of association to acquire the assets of any other company, and it cannot be that different principles would apply upon the realization of further assets so acquired.

1914 *July* 24.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The Commissioner of Taxes for the State of Victoria assessed the respondent company for income tax in respect of the year 1910 upon the sum of 113,998*l*., being the sum which in his judgment upon the figures appearing in the balance-sheet and report of directors of the said company, dated April 9, 1910, fell to be assessed under the Income Tax Acts. The respondent company objected to the assessment in so far as it was levied upon the sums of 104,782*l*. 1*s*. 4*d*. and 509*l*. 1*s*., which sums were admittedly included in the above-mentioned sum of 113,998*l*. What these sums were in respect of which objection was taken will be presently explained. The Commissioner of Taxes, at the request of the respondent company, stated a special case for the opinion of the Supreme Court of Victoria.

The questions for the opinion of the Supreme Court as put were:—

"(1.) Whether the surplus of 104,782*l*. 1*s*. 4*d*. mentioned in

(1) (1889) 14 App. Cas. 381.
(2) (1910) 11 C. L. R. 223.
(3) (1910) 5 Tax Cases, 658.
(4) 3 Tax Cases, 542, at p. 547.

paragraphs 19 and 22 of this case is profits earned in or derived in or from Victoria by the new company" (the respondents) "during the year 1909 or previous years within the meaning of s. 9 of Act No. 1819 so as to subject the new company to income tax in respect thereof?

"(2.) Whether the difference of 509*l.* 1*s.* between the prices of debenture stock and par mentioned in paragraphs 19 and 22 of this case is profits of the kind mentioned in question (1.)?"

The Supreme Court, by a majority of two to one, decided in favour of the Commissioner of Taxes, answering the questions put as follows:—

"(1.) The surplus of 104,782*l.* 1*s.* 4*d.* mentioned in paragraphs 19 and 22 of the said case is profits earned in or derived in or from Victoria by a company during the year 1909 or previous years within the meaning of s. 9 of Act No. 1819 so as to subject the company to income tax in respect thereof?

"(2.) The difference of 509*l.* 1*s.* between the prices of debenture stock and par mentioned in paragraphs 19 and 22 of the said case is also profits of the kind above mentioned so as to subject the company to income tax in respect thereof."

An appeal was taken to the High Court of Australia, and that Court by a majority of two to one reversed the judgment of the Supreme Court of Victoria, and in lieu of the order pronounced by that Court declared "that neither of the sums mentioned in the said questions is taxable."

From this judgment appeal is taken to their Lordships' Board.

It appears from what has been above stated that judicial opinion on the question has been strongly divided—three learned judges in all having been of one opinion and three of another. In such a state of matters it is not to be expected that the question should be one of easy solution, or that cogent arguments should not be found on both sides. Their Lordships recognize that fact, and have given careful and repeated consideration to the arguments addressed to them, and to the reasons put forward for their judgment by the learned judges of the Courts below. They will now state the result at which they have arrived.

To make the question intelligible it is necessary here to give

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as briefly as may be a history of the occurrences which led to the point arising.

Three Australian banks, namely, the English and Australian Mortgage Bank, Limited, the Federal Bank of Australia, Limited, and the City of Melbourne Bank, Limited, were unable to satisfy their creditors, and went into liquidation. The shareholders had virtually no interest in the liquidations, as the assets were avowedly insufficient to pay the creditors. Eventually in 1897 schemes of arrangement were sanctioned by the High Court in England and the Supreme Court in Victoria and, in the case of the second bank, also by the Courts of New South Wales and South Australia. In the case of each bank the scheme as affecting it sanctioned in England was identical with that sanctioned in Australia. In pursuance of the schemes of arrangement three companies were formed bearing the names of the English and Australian Assets Company, Limited, the Federal Assets Company, Limited, and the Melbourne Assets Company, Limited, respectively. In these companies the creditors of the respective banks were to receive in respect of their debts so much debenture stock and so many fully paid up shares. The whole assets of each of the insolvent banks were transferred to the respective companies, and the liquidation of the banks was brought to an end.

The respective assets companies then proceeded gradually to realize the assets, and with the proceeds to pay off the debenture stock, it being by the terms of its creation a redeemable stock. During the whole of the life of these companies the shares and debenture stock were transferable, and some of the stock and shares were in fact—but to an extent not accurately known—transferred.

By the year 1903 the whole of the debenture stocks had been redeemed.

In 1903 the respondent company was formed. The object of the company was to acquire the undertakings of the three separate companies in terms of agreements which had been made by the promoters of the respondent company with the three companies. In terms of these agreements the whole of the assets of the three respective companies were to be handed over

to the new company; the three companies were to be wound up, and the shareholders of the respective companies were in exchange for their shares to receive, in the case of the Melbourne Assets Company and the English and Australian Assets Company, cash, debenture stock, and shares; in the case of the Federal Assets Company, debenture stock and shares, all calculated at the rates set out in the said agreements. This was done. The respondent company then proceeded with the gradual realization of the massed assets, and applied various sums of the moneys so received in paying off its debenture stock. This was effected partly by buying their own stock in the market, and partly by redeeming the same, it being by the terms of its issue a redeemable stock. By October 15, 1909, the whole of its debenture stock was paid off.

Their Lordships must now refer to the report and balance-sheet of April 9, 1910, upon the terms of which the questions as put arise.

The balance-sheet is preceded by a profit and loss account. This account is framed on the ordinary lines of the profit and loss account of a going concern, and deals solely with the yearly revenue, deducting outgoings and expenses of the properties held by the company. It brings out a profit balance of 25,183*l.* 18*s.* 2*d.* to be carried to the balance-sheet. But it takes no account whatever of sums received from assets realized.

Coming to the balance-sheet we find on the liabilities side shareholders' capital and creditors and sundry other liabilities stated in ordinary form. We then come to the following item, which is the matter for special attention: "Realization Reserve Account.—Net surplus on realization to date (see paragraph 5 of directors' report), 144,765*l.* 9*s.* 8*d.* Discount on purchases and cancellation of debenture stock, 3943*l.* 5*s.* 6*d.*" Then these two figures are summed and brought out at 148,708*l.* 15*s.* 2d. Turning now to the report there are to be found the following passages:—

"5. As the result of the year's operations the Realization Reserve Account (consisting largely of purchasers' balances) has been increased by the sum of 47,442*l.* 15*s.* 5*d.*, making, with the amount brought forward from the previous year, a net surplus

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of 148,708*l.* 15*s.* 2*d.*, on realizations and profit arising on purchase of debenture stock for cancellation."

. . . . . .

"7. In the Profit and Loss Account no credit has been taken for accrued interest, rents, or dividends of an estimated amount of 4150*l.* After providing 1855*l.* 8*s.* 3*d.*, for interest paid on the debenture stock, the net profit including the balance brought forward from the previous year, 2149*l.* 15*s.* 5*d.*, is . . . . . £ 27,333 13 7

"The directors recommend that from this sum there be applied in payment of a dividend of fourpence per share (equivalent to slightly over 8 per cent.) free of income tax 22,777 15 4

"Leaving to be carried forward (subject to payment of income tax) 4,555 18 3

"The whole of the debenture stock having been paid off and the share capital of the company, without taking into consideration the Realization Reserve Account, being fully represented by assets, the directors also recommend to the shareholders that a distribution by way of bonus of sixpence per share should be paid in cash out of that account.

	£	*s.*	*d.*
"The sum at credit of the Realization Reserve Account is	148,708	15	2
"The bonus now recommended amounts to .	34,166	13	0
"Leaving at the credit of the Realization Reserve Account	114,542	2	2"

It is set forth in the special case that the assets of the three respective companies as taken over were entered at a valuation in the companies' books which reproduced a valuation made by the companies themselves four years before the transfer to the new company. As an individual asset came to be realized the difference between the actual price realized and the figure at which that asset stood was if it were a gain carried to a realization reserve account. It is also set forth that of the sum of 148,708*l.* 15*s.* 2*d.* mentioned in paragraph 7 of the report as

above set forth, the sum of 104,782*l.* 1*s.* 4*d.* represents surplus on realization of assets in Victoria, and 509*l.* 1*s.* represents the difference between prices paid and par for their own debenture stock in Victoria.

It is not necessary to set forth the particular provisions of the Income Tax Acts in force in Victoria. It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit. The argument for the respondents can be stated in a single sentence. They say they were not a trading company but a realization company; that the realization was truly for the benefit of the original creditors of the three banks; that all shareholders in the company are either such original creditors or the assignees of such original creditors. If that is the true view of the situation their Lordships do not doubt that the argument must prevail. If the liquidator of one of the banks had made an estimate of the various assets held by him for realization, and then on realization had obtained more than that estimate, such surplus would not have been profit assessable to income tax.

Their Lordships cannot, however, come to the conclusion that that is the true view of the situation. It is not necessary to decide the question as it might have arisen in the case of the original three assets companies. At least at the inception of the present company it seems to their Lordships that all concerned were satisfied to discharge their old claims by accepting shares in a new venture, and that that new venture must then be looked at to see if profits assessable to income tax have been earned. The position may be tested in more ways than one. Were it a case of liquidation, then the directors of the company would hold for the creditors of the old insolvent banks. They do not do so. They hold for the shareholders of the company; and the shareholders of the company comprise persons who never were creditors of the banks, but who acquired their shares in open market. Again, if it was liquidation, the right of each participant creditor, or creditor's assignee, would be strictly limited to the assets of the bank of which he was a creditor or represented a creditor. If, for example, the Melbourne Bank assets on realization turned out well, and the Federal Bank

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assets badly, the creditors of the one would benefit, and those of the other suffer. But as it is it is not so. Each shareholder has in respect of each share an equal interest in the proceeds of the massed assets which were originally assets of the three banks but now are assets of the company. Holding, then, that the shareholders of this company are shareholders in an ordinary venture, the only question that remains is whether the surpluses realized represent profits. Their Lordships think that the principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris.* (1) "It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself.

Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit.

There remains, however, a difficulty as to proof of the exact figure. It does not seem to their Lordships that the mere fact that an investment standing in the books at x pounds realizes on sale $x + y$ pounds settles that a profit of y pounds has been made. It is not that their Lordships doubt that the initial figure in the books may be taken. These figures represent in their Lordships' view real values, for so the parties have treated them. It was argued that they were mere valuations. In one sense that is true, for, not being put to the test of the market at the moment, the only way to affix a value was by valuation.

(1) 6 F. 894; 5 Tax Cases, 159.

But that they represent real value seems certain because, unless they did, it would have been impossible to regulate justly the share which each member of the three assets companies was to get in the new mixed mass of assets—or in other words what shares and debentures he should get in the new company. But it is possible that other investments on realization may shew loss instead of profit; and it is obvious that it is in the totality of the transactions that the question of profit comes to be fixed.

Their Lordships are, however, of opinion that the company may well be held bound by its own actions. In distributing a bonus of 6*d.* per share it affirmed that to that extent at least there was profit realized. In the same way in making a distribution of debenture stock on and after August 10, 1910, they may be held to have distributed profit.

Sect. 9, sub-s. 1, of the Income Tax Act of 1903 is as follows: "9.—(1.) So far as regards any company liable to pay tax, the income thereof chargeable with tax shall (except as provided in paragraph (*g*) of sub-section (1) of section 7 of the principal Act or as hereinafter provided) be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment."

This question of time does not seem to have bulked in the discussion in the Courts below—indeed the form of the question "during the year 1909 or preceding year" rather precludes it—but has been very earnestly pressed upon their Lordships' attention.

As regards the question of when a profit is earned their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronizes with the realization of the sums which swell the assets of the person or company, and which entering the account (whether on the creditor or debtor side will depend on the particular account in view) go to bring out the balance which is deemed profit. But for the reasons already given their Lordships think that in a case like this the company are entitled to hold at least a part of their realizations in suspense—as indeed they have done in their accounts—and that it is only when finally the same is given to the shareholders that the final impress of profit is, so to speak,

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stamped upon it, and that therefore, for the purposes of the Act, that is the time at which it is earned.

Holding this view their Lordships will humbly advise His Majesty to allow the appeal and set aside the judgment appealed against, and also the judgment originally passed by the Supreme Court, and remit the case to the Supreme Court with the following declarations:

1. Declare that the respondent company is so constituted and has so carried on its affairs that any surplus ascertained and realized of the proceeds of the assets of the assets companies over the consideration paid by way of purchase-money for them, after making all just deductions, would be profits taxable as income in the following year; this being over and above any annual surplus of incomings over outgoings of the concern.

2. Declare that as regards the bonus of 6*d.* per share referred to in paragraph 7 of the directors' report of April 9, 1910, there is evidence sufficient to shew that this is taxable as profit so far as it was earned in or derived from Victoria; and that pari ratione the distribution of debenture stock to shareholders calculated as justified by the state of the realization reserve account should be properly held to be taxable as profit according to the pecuniary value thereof.

3. Declare that the case does not state facts sufficient to determine any other questions either as to the amount of the profits or the years in which they are assessable.

4. Declare that the Commissioners be at liberty to apply to the Supreme Court for any inquiries and accounts that may be necessary.

5. Declare that neither party shall be entitled to costs.

There will be no costs to either party before this Board.

Solicitors for appellant: *Freshfields.*

Solicitors for respondents: *Linklater, Addison & Brown.*

[PRIVY COUNCIL.]

SYME . . . . . APPELLANT;

AND

COMMISSIONER OF TAXES . . . . . RESPONDENT.

J. C.* 1914 *June* 25; *July* 28.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Revenue—Income Tax—Income from Personal Exertion—Business carried on by Trustees—Income Tax Act, 1895 (*No.* 1374, *State of Victoria*), *s.* 2—*Income Tax Act*, 1896 (*No.* 1467, *State of Victoria*), *s.* 4.

Under the provisions of a will, the trustees thereby appointed carried on certain businesses in Victoria which had belonged to the testator and paid to the appellant a fifth share in the annual profit thereby made:—

Held, that in respect of the income so received by the appellant he was entitled to be assessed under the Income Tax Acts, 1895 and 1896, of Victoria, as upon income derived from personal exertion, and that he was wrongly assessed as upon income the produce of property.

APPEAL from a judgment of the Supreme Court of Victoria (April 8, 1913) upon a special case stated under the Income Tax Acts of that State.

By the will of the appellant's father the trustees thereby appointed continued to carry on certain businesses in Victoria which the testator was carrying on at his death, and paid a fifth share of the annual profits thereof to the appellant.

The respondent, in assessing the appellant for income tax, under the Income Tax Acts, 1895 and 1896, for the year 1910, treated the amount so received by him for that year as income from the produce of property. The appellant paid, under protest, the tax charged and lodged an objection under the above Acts. He claimed that the income in question was income from personal exertion within the meaning of s. 2 of the Act of 1895, as amended by s. 4 of the Act of 1896, and was consequently taxable upon a lower scale than that charged.

The facts of the case and the material parts of the two sections above mentioned are set out in the judgment of their Lordships.

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and SIR JOSHUA WILLIAMS.

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The objection came on for hearing before a judge of the county court, who, upon the application of the appellant, stated a special case for the opinion of the Supreme Court.

The Supreme Court affirmed the assessment, considering that the facts were indistinguishable from those in *Webb* v. *Syme* (1), in which the High Court of Australia reversed the unanimous decision of the Supreme Court of Victoria. (2)

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the appellant. The share of the profits of the business received by the appellant from the trustees was income from personal exertion within the meaning of the Income Tax Acts, and is taxable upon that basis. Upon the true construction of the Acts of 1895 and 1896, income derived from personal exertion maintains that character until it reaches the hands of some person who can do what he pleases with it. Either the trustees were the persons taxable under the Acts, in which case the income was clearly derived from personal exertion, or the appellant has to pay the tax because he is the person entitled to the income, which is income from personal exertion. Sect. 2 of the Act of 1895 as amended by s. 4 of the Act of 1896 does not provide by whom the business is to be carried on. The income received by the beneficiary is the same income as that received by the trustees, and the definition of "income tax" in s. 2 of the Act of 1895 shews that the tax is one on the income, not on the person. [The following sections of the Income Tax Act, 1895, were also referred to: s. 5, s. 6, sub-s. 2, ss. 8, 12, 14, 15, 34 and 41.]

Poley (with him *Sir R. Finlay, K.C.*), for the respondent. The assessment was properly made. The appellant, as the recipient of his share of the trust fund, derived his income from the "produce of property" within the meaning of s. 2 of the Act of 1895. He was in effect in the same position as an annuitant whose income is charged upon the business. The general construction of the Acts of 1895 and 1896 shews that the appellant was taxable as the beneficial owner of the fund. The provisions as to deductions from the income returned, which may be made under s. 9, sub-ss. 2 and 3, of the Act of 1895,

(1) (1910) 10 C. L. R. 482. (2) 1909 Vict. L. R. 584.

shew that it is the person who is the final recipient of the income who is the person to be taxed. The trustees are not primarily chargeable under the Act, but are only liable under the special circumstances set out in s. 12, sub-s. 1, s. 15, sub-s. 2, and s. 41, sub-s. 1, of the Act of 1895, and s. 12 of the Act of 1896. The income received by the appellant from the trustees was a different income from that derived by the trustees from the business, being paid out of a fund arrived at by the trustees after setting off profits and losses and deducting prior charges. There is, therefore, no reason why the income as received by the trustees should not be derived from personal exertion, while the share as received by the beneficiary is income the produce of property.

P. O. Lawrence, K.C., in reply. The trustees are primarily liable under the Act. No difficulty arises on account of deductions to which a beneficiary is entitled since s. 34, sub-s. 2, of the Act of 1895 provides for a refund to the beneficiary.

1914
July 28.

The judgment of their Lordships was delivered by

LORD SUMNER. The question on this appeal is shortly whether a portion of the appellant's income is assessable to income tax as income derived by him from personal exertion or as income derived by him from the produce of property within Victoria, within the Income Tax Acts, 1895 and 1896, of the State of Victoria. The appellant returned this sum under the former head; the Commissioner of Taxes assessed him under the latter, and thereby doubled the rate of tax chargeable. Mr. Syme objected, and paid under protest, and his objection was duly transmitted for hearing and determination to a judge of county courts, who stated a case for the opinion of the Supreme Court which raised the above question. The Supreme Court decided against him on the authority of *Webb* v. *Syme* (1), in which the same question, on practically the same state of facts, had been answered by the Supreme Court of the State of Victoria in Mr. Syme's favour and against him by the High Court of Australia. So far as questions of principle and of construction of the Acts

(1) 10 C. L. R. 482.

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are concerned, this case is therefore in effect an appeal from *Webb* v. *Syme*. (1)

Briefly, the facts are these. Mr. David Syme was a newspaper proprietor, and printed and published the *Age*, the *Leader*, and *Every Saturday*. The business was large and lucrative. He had also separate businesses, relatively inconsiderable, in connection with the properties known as Killara and Melbourne Mansions, and a farm at Mordialloc. He called the publishing concern "the *Age* business" after the principal and well-known newspaper. In 1908 he died, leaving a widow, five sons, of whom the appellant is the eldest, and two daughters. The debts and funeral expenses of the testator had been paid prior to 1910. On this one point the facts in this case differ from those in *Webb* v. *Syme* (1), and for what it is worth it is in the appellant's favour. In *Webb* v. *Syme* (1) some reliance was placed on the possibility that in the year of assessment then in question there might be debts of the testator still to be discharged. There were none in the year in question now.

David Syme left certain specific legacies, and then gave the residue of his estate, consisting principally of the above businesses, to trustees. The "*Age* business" they were to carry on, the other businesses and the rest of the residuary estate they were to convert, with power to postpone the conversion and to manage in the meantime. Out of the income of the residuary estate and out of the profits of the "*Age* business" and the other businesses while carried on, the trustees were to pay to the widow an annuity, which is the first charge thereon, to set aside certain capital sums for the benefit of the testator's daughters, and also of a charity to be called by his name, and then, as to the residue, to divide the income equally among the five sons. This is being done at present, and the ulterior trusts are not now material.

It so happens that the will names the appellant as one of the trustees, but it is rightly agreed that this is for present purposes of no consequence, as he might be removed and replaced by some one else. It also happens that as one of the managers of the "*Age* business" he is paid an appropriate salary, but

(1) 10 C. L. R. 482.

nothing turns on this. His salary is clearly income derived by him from personal exertion, and is so assessed, and is outside the area of matters in dispute.

Having cleared the testator's estate of debts the trustees are now carrying on the businesses. In the main they do so at a large profit. For 1910 the newspaper business yielded a profit of 81,759*l.* 15*s.* 1*d.*, and the Melbourne Mansions business a profit of 3715*l.* 16*s.* Losses were incurred at Killara and Mordialloc, but they only amounted together to 376*l.* 4*s.* 8*d.* On the whole there was 85,397*l.* 13*s.* 10*d.* to divide, of which the appellant's one-fifth share is 17,079*l.* 10*s.* 9*d.* This he returns as 17,025*l.* 17*s.* 3*d.* derived from personal exertions, and only 53*l.* 13*s.* 6*d.* from the produce of property. The Commissioner claims and the Supreme Court has held, as the High Court held in *Webb* v. *Syme* (1), that the 17,025*l.* 17*s.* 3*d.* is also derived from the produce of property.

There is no doubt that this money is made in business, and s. 2 of the Income Tax Act, 1895, as amended by s. 4 of the Income Tax Act, 1896, which Acts are to be read as one Act, defined "income derived by any person from personal exertion" as, among other things, "all income arising or accruing from any trade carried on in Victoria, although the income has not arisen or accrued or been . . . . derived from the taxpayer's own personal exertion or trade," and "trade" is defined to include every business. Under the same sections "income derived by any person from the produce of property" is defined as meaning "all income derived in or from Victoria, and not derived from personal exertion," which again "shall include income of the taxpayer, although the same has not been derived from his own property." The charging section, which is s. 5 of 1895, classifies the tax according as the income taxed falls within one or other of the above categories.

Their Lordships are unable to hold that the portion of the appellant's income in question is not "income arising or accruing from any trade carried on in Victoria," and therefore is "income derived from the produce of property," and this for several reasons.

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In saying "any trade carried on in Victoria" the definition does not say by whom such trade is carried on. The amending section enlarges "personal exertion" and extends it to trade carried on by vicarious exertion without stating the legal relationship between the real and the vicarious trader, or defining the capacity in which the business must be carried on by the latter. Their Lordships were informed that the provision in the Act of 1896 was inserted to settle a doubt whether a person could claim the lower, or personal exertion, rate, when all the work in his business was done for him by his agents. Be this as it may in fact, the enactment is general in form: it does not make the definition of 1895 affirmatively include business carried on by agents, but it provides negatively that a business may be carried on by personal exertion for the purposes of this Act, even when there is no personal exertion on the part of the person who benefits by the business, but everything is done for him. Again the Act does not say for whom the trade is carried on. When a trade is carried on by trustees there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by the trust deed. Unless the definition clause, as amended, is interpreted as though it ran "any trade carried on by the taxpayer or his agents," for which the language of this taxing Act affords no sufficient warrant as against the subject, the definition of "income derived from personal exertion" is wide enough to cover the present case. What the appellant gets is "income arising . . . . from a trade carried on in Victoria" by trustees, for the benefit of himself and others, entitled equally with him, "although the same has not accrued . . . . from his own personal exertion" in his capacity as such a beneficiary.

Again, it is not disputed that in certain events the trustees are assessable in respect of the appellant's one-fifth share of the earnings of the "*Age* business," and the appellant contends that they are assessable in respect of the entire five-fifths in any event at the option of the Commissioner. Now there is no doubt that these Income Tax Acts do not contemplate taxing the same fund twice over. If the trustees are assessed, they must

be assessed upon "income derived from personal exertion," for by the personal exertion of themselves or their agents they make the money in trade. How then can the appellant be assessed otherwise when the assessment is made directly upon him? If the same money is to be regarded as two incomes, as it must be if it is to be assessable on two different bases, there would be double taxation of the same money, which no one suggests; and if there is no double taxation of the same money, then since the same money is, at any rate in some events, assessable in the alternative either on the trustees, who make it, or on the beneficiaries, who enjoy it, the assessment must in either case be made on the personal exertion basis, for that and that alone fits the case of an assessment on the trustees. For this purpose it matters not whether the cases in which either the trustee or the cestuis que trust can be assessed in the Commissioner's option be few, as the Commissioner argues, or many, as the appellant submits. In either event the logical result is the same. Since both the trustees and the cestuis que trust can be assessed on this money, either both must be assessed at the same rate, and that must be the personal exertion rate, for to tax the trustees at the produce of property rate on what they earn themselves would be impossible; or they must be taxed at different rates in the option of the Commissioner, although the subject-matter of taxation is one and the same fund.

There is no escape from this dilemma except the one adopted by the majority of the High Court of Australia in *Webb* v. *Syme* (1), and supported by the respondent on this appeal, and the crux of the case has been: is this a way out?

The argument is that the Act must be deemed to contemplate the assessment of the persons who are the final recipients of an income and can spend it as they please, since it provides (s. 9, sub-s. 2, of Act No. 1374) that, in estimating the balance of income liable to be taxed, on the one hand rent of dwelling-houses, maintenance of families, and other personal disbursements shall not be deducted, and on the other (s. 9, sub-s. 3, of Act No. 1374) that premiums of insurance on the taxpayer's life, calls or contributions on shares held by him in companies

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in liquidation or reconstruction, and losses incurred in other trades which he may carry on may be deducted. These are all matters neither known to nor any concern of trustees. This is so; but there is nothing to limit persons who can be assessed to such persons as may wish to deduct the expenses of their families, or be in a position to deduct premiums, because they have families for whose benefit they insure their lives. Such persons are included and taxed no doubt, and may be a large proportion of the taxpayers, but others, trustees among them, are included; and when trustees are assessed s. 34, sub-s. 2, provides sufficient machinery to enable the cestui que trust to obtain the benefit of such deductions in the shape of a refund, direct or indirect, of tax overpaid by a trustee who was ignorant of, or for any other reason did not or could not claim, the deductions which his cestui que trust might have made. Next it is said that s. 15, sub-s. 2, and s. 41, sub-s. 1, of Act No. 1374 and s. 12, sub-s. 1 (*c*), of Act No. 1467 shew that the Legislature intended to impose assessment upon a trustee only as a secondary liability, failing payment of the tax by the cestui que trust, or failing the opportunity of assessing him in the first instance. Their Lordships are unable to accept the contention. The Acts say nothing about the primary liability of the cestui que trust and the secondary liability of the trustee; they do not make the trustee a surety for his cestui que trust's income tax; at most they give him a right of recourse in case he is compelled to pay it. The Acts, in so far as they make trustees assessable, do so upon the same footing as the cestui que trust, and this is for the more convenient collection of the revenue, and cannot therefore by any implication increase the burthen on the taxpayer.

Lastly, it is said that the income is not the same income, and the fund which produces it is not the same fund, when the trustees are assessed as when the cestui que trust is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true, but all this is mere

bookkeeping. It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost. There is no difficulty, either in fact or in theory, in keeping the "*Age* business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The Commissioner's argument conceived the fund out of which the appellant is paid as a reservoir, fed by various streams descending from sundry sources and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned judges, the majority in the High Court of Australia in *Webb* v. *Syme* (1), who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of shewing whence the sovereigns came in the first instance which were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they keep accounts all the time, and there is no doubt whatever that the appellant's 17,025*l.* 17*s.* 3*d.* comes from the "*Age* business," and that of the Melbourne Mansions Company was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the cestui que trust.

Their Lordships are accordingly of opinion that the appellant's contention is right that the question stated in the special case should have been answered in his favour, and that the judgment of the Supreme Court of Victoria should be set aside, and judgment should be entered for the now appellant for the amount paid by him under protest and in excess of his

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contention, and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment as above stated should be entered for Mr. Syme.

Solicitors for appellant: *Keen, Rogers & Co.*
Solicitors for respondent: *Freshfields.*

[PRIVY COUNCIL.]

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CANADIAN PACIFIC RAILWAY COMPANY AND OTHERS . . . . . } APPELLANTS;

AND

CANADIAN OIL COMPANIES, LIMITED . RESPONDENTS.

[AND CONSOLIDATED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Railways—Traffic between Canada and United States—Joint Tariff—Superseding Tariff—Declaratory Order—Jurisdiction of the Board of Railway Commissioners—Railway Act (*R. S. Can.*, 1906, *c.* 37), *ss.* 321, 336, *and* 338.

Where, in respect of traffic to be carried by a continuous route from a point in the United States into Canada, a joint tariff is filed with the Board of Railway Commissioners under s. 336 of the Railway Act, making use of a classification in use in the United States as permitted by s. 321, sub-s. 4, of that Act, the joint tariff so filed cannot be altered or superseded by a tariff using a classification which is neither one in use in the United States nor one authorized by the Board.

The Board of Railway Commissioners has jurisdiction under s. 26 of the Railway Act to make a declaratory order in reference to a rate illegally charged, although its operation has been withdrawn by the company before the order is made.

CONSOLIDATED APPEALS, by special leave, from two judgments of the Supreme Court of Canada (June 4, 1912) dismissing appeals from two orders of the Board of Railway Commissioners for Canada (May 16, 1911).

The questions in controversy in the appeals involved the

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

construction of the sections of the Railway Act of Canada (R. S. Can., 1906, c. 37) relating to the carriage of goods from points in the United States to points in Canada at joint rates and the validity of certain rates which were charged by the appellants and paid during the years 1907 to 1910. The facts were not in dispute and were shortly as follows.

The lines of the appellants the Canadian Pacific Railway Company connect at the international boundary between Canada and the United States with the lines of the Lake Erie and Western Railway Company and of other United States companies; the lines of the appellants the Grand Trunk Railway of Canada also connect there with the lines of the Indianapolis Southern Railroad Company. It was in connection with through traffic originating on the United States companies' lines and destined for the appellants' lines that the questions in the appeals arose.

It is the practice both in the United States and in Canada to publish railway rates by means of tariffs and classifications which relate to each other. The classification consists of an alphabetical list of commodities specifying the number of the class to which each commodity is assigned. The tariff specifies the rate, either upon a mileage basis or from point to point, applicable to each of the classes mentioned in the classification. The United States companies belong to an association called the Freight Traffic Association, which publishes from time to time classifications of commodities agreed upon by the United States companies in question and other companies operating in the same part of the United States. These classifications, although styled official classifications, are only binding in the United States by the agreement of the companies concerned. Any freight classification in use in the United States may, subject to the order of the Board of Railway Commissioners (hereinafter called the Railway Board), under s. 321 of the Railway Act, be used by Canadian companies with respect to traffic to and from the United States.

Prior to January 1, 1907, joint tariffs and an official classification, No. 28, for through traffic had been agreed upon by the appellants and the United States companies, and had been filed

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with the Railway Board in Canada and with the Interstate Commerce Commission in the United States. This classification did not classify petroleum, which was carried on a special or commodity rate, made up of the sum of the local rates, amounting to 32 cents per 100 lbs. between the points in the United States and the points in Canada in question in the case.

Official classification No. 29 was published in the United States to come into effect on January 1, 1907, and for the first time included, in class 5, petroleum and petroleum products. This new classification was filed with the Railway Board, with the effect that the established joint rate for fifth class commodities, including petroleum and petroleum products, between the points in the United States and in Canada in question were reduced to 20 cents per 100 lbs.

This not being in accordance with the intention of the railway companies concerned, the United States companies, with the appellants' concurrence, filed with the Interstate Commerce Commission in the United States and with the Railway Board in Canada a number of supplementary tariffs (hereinafter called supplements) providing in effect that class 5 rates should not apply to petroleum traffic moving from the United States into Canada, but that the through rate in that case should be the sum of the local rates, that is from 30 to 32 cents per 100 lbs.

The effect of these supplements in the United States was to make the rates thereby established the only valid and legal rates which the United States companies could charge. In Canada none of the supplements were disallowed by the Railway Board, and the appellants proceeded throughout the years 1907 to 1910, inclusive, to collect the rates so specified from consignors or consignees of petroleum and petroleum products.

In these circumstances, on August 4, 1910, the respondents the Canadian Oil Companies, Limited, who were among the consignees of the petroleum traffic, filed an application to the Railway Board against the appellants the Grand Trunk Railway of Canada applying for an order, under ss. 315, 317, 336, and 338 of the Railway Act, declaring that the said appellants had unjustly discriminated against shipments of petroleum and its products from specified points in the United States to specified

points in Canada by refusing to carry them at the published and filed fifth class rates, in accordance with the official classification, and for an order declaring that the said appellants had overcharged the applicants, and prescribing the tolls chargeable and such further relief as might seem just.

An application in the same terms was filed on August 9, 1910, by the respondents against the appellants the Canadian Pacific Railway Company.

On December 31, 1910, before these applications came on for hearing, the United States companies, with the concurrence of the appellants, filed with the Interstate Commerce Commission, and with the Railway Board, supplements restoring the rate to 20 cents per 100 lbs.

On January 25, 1911, the respondents (in the consolidated appeal) the British American Oil Company filed an application to the Railway Board applying for a similar order against the appellants the Canadian Pacific Railway Company.

On May 16, 1911, the three applications came on before the Railway Board, which made two orders thereon declaring that "the legal rates chargeable were the fifth class joint through rates in effect at the time the shipments moved, as shown in the joint traffic through tariffs published and filed with the Board and in accordance with the official classification No. 29, and subsequent issues thereof."

The Chief Commissioner, the late Mabee J., who gave the reasons of the Board, was of opinion that once a joint rate has been established upon a commodity, it can only be superseded by the substitution of another joint rate for that commodity, and he held that the supplements filed by the United States companies had no legal effect and did not supersede the provisions of the joint tariffs and the official classification No. 29.

The appellants obtained leave from the Railway Board, under s. 56, sub-s. 3, of the Railway Act, to appeal to the Supreme Court of Canada upon the question as to the construction of the provisions of that Act, and leave from the Supreme Court, under s. 56, sub-s. 2, of that Act, to appeal on the further question as to the jurisdiction of the Board to make the orders.

On June 4, 1912, the Supreme Court (Davies, Idington, Duff,

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Anglin, and Brodeur JJ.) delivered judgments dismissing the appeals. The learned judges held that the Railway Board had jurisdiction under s. 26 of the Railway Act to make a declaratory order notwithstanding that the grievance complained of had been remedied, and that the classification No. 29 had not been superseded by the supplements filed. Davies J. agreed with the view of the Chief Railway Commissioner, and Anglin J. was of opinion that a joint tariff once established could only be superseded by an order of the Railway Board. Idington and Duff JJ., while not deciding whether a joint tariff could be superseded by a new joint tariff without the intervention of the Railway Board, held that the supplements did not constitute a new joint tariff. Brodeur J. concurred in the effect of the judgments. The appeal to the Supreme Court is reported at 47 Can. S. C. R. 155.

Sir R. Finlay, K.C., F. H. Chrysler, K.C., and *Geoffrey Lawrence*, for the appellants. The supplements filed with the Railway Board by the United States companies with the concurrence of the appellants were legal and binding. A joint tariff filed under s. 336 of the Railway Act by agreement between a Canadian and United States company can be superseded by filing a supplement. The Supreme Court of Canada in *Grand Trunk Ry. Co.* v. *British American Oil Co.* (known as the *Stoy Case*) (1) held that where a United States company file a joint rate, and it is acted on, it is binding upon the Canadian company concerned, without their express consent. The view of Anglin J., in dissenting in that case, that under s. 336 there must be a consent by both companies is correct. Upon its true construction s. 336 means that a joint tariff shall be filed with the Railway Board, and shall continue in force if and so long as the railway companies who are parties to it consent. Upon the true construction of s. 338 the words "by the Board" govern "disallowed" and not "superseded." Throughout the Act "superseded" is used in reference to the action of the companies. There is a marked difference between the language of s. 327, referring to standard freight tariff, and that of s. 328, referring to special freight tariffs. Under s. 327 a standard tariff has to be approved by the Board,

(1) (1913) 43 Can. S. C. R. 311.

but under s. 328 a special tariff comes into operation upon being filed and the companies have to charge the tariff specified until it " is superseded, or disallowed by the Board," and the supersession may be of any portion of the joint tariff. A supersession can be made either, as in the present case, by taking a commodity out of the classification, in which event the standard tariff applies to it, or by substituting a new joint tariff. There is nothing in the Act which prevents a joint tariff being specified as the sum of two local rates. The Legislature cannot have intended to enact that Canadian railway companies should be bound to carry through traffic between the United States and Canada at joint rates which the United States companies concerned refuse to recognize.

The Railway Board had no jurisdiction to make the order, seeing that petroleum had been restored to class 5 before the order was made. The powers of the Board are confined to disallowing an existing rate; it has no jurisdiction to make a declaratory order. Sect. 328, sub-s. 4, provides that the rate specified shall be charged until superseded or disallowed. The provisions of s. 323 as to disallowance by the Board shew clearly that a disallowance cannot be retrospective. Sect. 26, which was relied on by the present respondents below, merely provides machinery for enabling the Board to carry out the powers given by the specific provisions of the Act; it does not increase the scope of the Board's jurisdiction: *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Investment Co.* (1) [The following sections of the Railway Act were referred to: ss. 26, 314, 317, 321 to 323, 325 to 329, 333 to 339, 397, 398, 427, and 428.]

Balfour Browne, K.C., and *W. N. Tilley*, for the respondents. The appellants having joined in the operation of a continuous route from the United States to Canada, and having agreed to file a joint tariff under s. 333, are bound under s. 338 to charge the tolls specified until the joint tariffs are superseded in accordance with the Act. The legal toll depends upon (1.) a tariff and (2.) a classification. Where under s. 321, sub-s. 4, a freight classification in use in the United States has been adopted, as in the present case, the United States classification can be altered and the substituted classification can be

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accepted as a whole, but under s. 338 the joint tariff cannot be superseded by the company without an order of the Board. Even if the railways can supersede a joint tariff, they have not done so in the present case. A tariff or supplement cannot "supersede" an existing joint tariff unless it is itself a joint tariff, but the supplements were not valid joint tariffs. Their effect was that petroleum was to remain in the fifth class in the United States and when consigned from a point in the United States through Canada to another point in the United States, but that it was not to be in the fifth class when consigned from the United States into Canada. They, consequently, did not adopt any classification in use in the United States, but were an attempt to vary the classification so as to discriminate against Canadian consignees. Further, the supplements did not specify a joint through tariff rate for petroleum, but stated that the rate was to be the sum of the local rates. Upon the true construction of ss. 335, 336, and 338 a joint through tariff cannot validly be so specified. A document filed with the Railway Board does not specify a rate unless it definitely states what it is to be, or refers to another document filed with the Board which does so; here, however, the rate which the supplements attempted to establish depended upon the local rate in the United States, which was not filed with the Railway Board. The decision in *Grand Trunk Ry. Co.* v. *British American Oil Co.* (1) has no direct bearing upon the present appeal. In that case one company had always dissented and it was held that a joint through tariff never came into existence; the question whether the supplements were effective was not determined. The judgments in the Supreme Court and that of Mabee J. at the hearing before the Railway Board (2) support the respondents' argument. The Railway Board had jurisdiction under s. 26 of the Railway Act to make the order although the rates had been discontinued. That section is in the widest terms, and heads (A) and (B) of it should be read separately. The Board were entitled to make the order for the protection of the public. [On the question as to jurisdiction they also referred to ss. 49 and 318 of the Railway Act.]

(1) 43 Can. S. C. R. 311. (2) (1909) 9 Can. Ry. Cas. 178.

Sir R. Finlay, K.C., in reply. The classification adopted by the supplements was a classification in use in the United States, even though it provided for a variation according to the destination of the traffic. Even if the supplements were not valid joint tariffs they nevertheless superseded the existing joint tariffs under classification 29 by taking petroleum out of class 5.

The judgment of their Lordships was delivered by

LORD DUNEDIN. In these consolidated appeals exception is taken to the unanimous judgment of the Supreme Court of Canada affirming a determination of the Board of Railway Commissioners.

The dispute arose in connection with the through rates charged by the Canadian railway companies on petroleum and its products carried from certain points in Ohio and Pennsylvania to Toronto and other points in Canada. The oil companies considering that they were aggrieved by the rates which had been exacted from them since January 1, 1907, presented, in August, 1910, three applications to the Board of Railway Commissioners against the two railway companies asking for a declaration that they had been overcharged, in respect that the railway companies had refused to carry petroleum and its products at joint tariff rates for the fifth class in accordance with the official classification.

The three applications were heard together, and judgment was given in all on May 16, 1911. The order pronounced in each case, though not in exactly the same words, was really exactly the same, and it is sufficient here to quote that pronounced in the application of the Canadian Oil Companies, Limited, against the Grand Trunk and the Canadian Pacific, which was in these terms:—"It is declared that the legal rates chargeable on petroleum and its products in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth class joint through rates in effect at the time the said shipments moved, as shown in the joint through tariffs published and filed with the Board, and in accordance with the official classification No. 29, and subsequent issues thereof."

The Board granted leave to the railway companies to prosecute

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an appeal on the following question of law:—"Did the Board place the proper legal construction on the documents referred to in the judgment?" In addition to this, by means of an application in chambers, the companies obtained leave from Idington J. to raise upon this appeal the additional question of whether the Board had jurisdiction to make the order it did.

The facts which raise the dispute may be very shortly stated. The railway companies in conjunction with the corresponding railway companies in the United States filed a joint tariff which specified certain rates for the different classes, as per the official classification in use in the United States. Up to January 1, 1907, the official classification did not classify petroleum or its products, which were accordingly carried at a special commodity rate, being the sum of the local rates. On January 1, 1907, official classification No. 29 came into force. This classification inserted petroleum in class 5. The result of this was to apply the fifth class rate to petroleum and its products. In other words, taking a concrete instance of a transit in question, the through rate became 20 cents per 100 lbs. instead of 32 cents per 100 lbs. In order to avoid this result the railway companies filed with the Board documents which they entitled supplements. The wording of those supplements, and the dates at which they were declared to be effective, varied somewhat. One illustration will suffice. The Indianapolis Southern Railroad Company with the concurrence of the two Canadian railway companies filed the following:—"Rates named in above described tariff will not apply on petroleum and its products to points in Canada. Rates to Canadian points will be on basis of lowest combination to and from the Canadian gateways."

The question therefore on the merits is simply whether such a proceeding was effective to relieve the railways from their obligation to carry petroleum at fifth class rates.

The question as to jurisdiction arises thus: The railway companies would not deliver unless the sum of the local rates was paid. The oil companies were therefore forced to pay the higher rate, and this continued up to the time of the presenting of the application to the Railway Commissioners. By the time, however, that the application came to be disposed of, the railway

companies of their own free will had consented to carry at fifth class rates. In these circumstances an order of the Board could only be declaratory, as it was unnecessary to pronounce an executive order. And the railway companies contend that such an order is ultra vires of the Board.

The Supreme Court of Canada held unanimously that the Board had jurisdiction to make such an order. Their Lordships agree with that view, and concur with the reasons set forth in the judgments of the learned judges of the Supreme Court. Sect. 26 of the Railway Act confers jurisdiction on the Board "to inquire into, hear, and determine, any application of a party interested complaining that any company . . . . has done or is doing any act, matter, or thing, contrary to or in violation of this Act or the special Act." If the charges exacted were illegal charges because the Act did not allow them, it seems clear that the railway companies had done something contrary to or in violation of the Act, and it seems impossible to refuse a person interested a declaration to that effect. It was urged by the companies that a declaration was in the circumstances unmeaning as to the future, and would only prejudice them as to the past in a possible action of repetition. It is probably not right to allow considerations as to actions of repetition to enter into the matter if the point on jurisdiction be clear. But even if it were it is evident that the railway companies suffer no real prejudice. Any action for repetition to be successful must begin in substance though not in form by a declaration of right. All pleas of a prejudicial character based on the fact of money in fact paid, settlement with other parties, &c., will be just as good or just as bad as replies in a future petitory action, whether the declaratory finding—if such is justified on the merits—is settled for the first time in that action, or is taken as settled by the determination of the Supreme Court in this.

Turning now to the merits. Argument was adduced to their Lordships on various topics, embracing the rights of railway companies in Canada to resist joint tariffs filed by American companies, subjects which were dealt with in what is known as the *Stoy Case*. (1) In the view of their Lordships such topics do

(1) 43 Can. S. C. R. 311.

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not arise for decision in this action, and their Lordships express no opinion upon them. It seems to their Lordships that there is a short ground of judgment which is conclusive so far as this case is concerned.

All tariffs are composed of two parts, (1.) what may be termed the tariff proper and (2.) the classification. Now the matter of classification is regulated by s. 321 of the Railway Act, which applies to all tariffs, whether standard, special, competitive, or through, and that section is as follows: "1. The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorise, and the Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests. . . . .

"4. Any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States."

Joint tariffs for through routes from points outside Canada into Canada (which is the class of traffic referred to in the application) are regulated by s. 336, which is in the following terms: "As respects all traffic which shall be carried from any point in a foreign country into Canada or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board."

The effect is prescribed by s. 338: "Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.

"The Board may require to be informed by the company of

the proportion of the toll or tolls in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received."

Now in the first case it is admitted that a joint tariff was filed; and it is admitted that the companies did not, so far as the classification is concerned, make use of a classification which the Board has prescribed or authorized, under s. 321, sub-s. 1, but availed themselves of the liberty given them by s. 321, sub-s. 4, to use a classification in use in the United States. What, however, the railway companies sought to do by means of their so-called supplements was to introduce a classification which was neither a classification in use in the United States—for that ex hypothesi was No. 29 which they sought to amend—nor a classification authorized by the Board, for no one says that the Board ever authorized the charges proposed by the so-called supplements. This in their Lordships' judgment was quite beyond their powers: with the result that they proceeded to exact charges which were not sanctioned by any joint tariff framed with classification in the way in which the statute permits it to be framed.

Upon this short ground, and without entering into the other matters argued, their Lordships are of opinion that the Supreme Court was right in upholding the jurisdiction of the Board to make the order it did, and in deciding that that order embodied a declaration which was right on the merits; and they will humbly advise His Majesty to dismiss the appeals with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1914
May 13, 14;
June 16.

BRITISH ELECTRIC RAILWAY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

VIOLET GENTILE . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Negligence—Death—Action for Benefit of Family of Deceased—Time for commencing Proceedings—Limitation in Special Act—Families Compensation Act (R. S. B. C., 1911, *c.* 82), *ss.* 3 *and* 5—*Fatal Accidents Act*, 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 1 *and* 3.

The Families Compensation Act of British Columbia is, save in slight and immaterial respects, in the same terms as the Fatal Accidents Act, 1846 (known as Lord Campbell's Act), and provides that actions thereunder shall be commenced within twelve calendar months of the death of the deceased. The appellants operated a tramway under powers conferred by an Act of the above Province which by s. 60 provided a six months' period of limitation in respect of "actions for indemnity for any damage or injury sustained by reason of the tramway, or the operations of the company."

One of the appellants' tramcars having knocked down and instantly killed a man, the respondent commenced an action against them under the Families Compensation Act for the benefit of the father and mother of the deceased. The action was commenced more than six months but less than twelve months after the accident and death :—

Held, that the cause of action under the Families Compensation Act was a different cause of action from that which the deceased person would have had if he had lived, and was not one to which the limitation section in the appellants' Act applied; and that the action was accordingly maintainable.

Markey v. *Tolworth Joint Isolation Hospital District Board* [1900] 2 Q. B. 454 disapproved.

APPEAL from a judgment of the Court of Appeal of British Columbia (May 20, 1913) affirming the judgment of the Supreme Court (October 30, 1912) at the trial before Morrison J. and a jury.

The appellants own and operate a tramway in the cities of Vancouver and New Westminster as the successors in title of the

* *Present:* LORD DUNEDIN, LORD MOULTON, LORD PARKER OF WADDINGTON, and SIR GEORGE FARWELL.

Consolidated Railway Company, the trustees for the debenture-holders in that company having sold the undertaking with its rights and privileges to the appellants under power contained in the company's special Act, namely, the Consolidated Railway Company's Act, 1896 (British Columbia).

The action was commenced by the respondent on June 10, 1912, as administratrix of one Vernon Aldrich, who was knocked down and killed by one of the appellants' tramcars on October 7, 1911. The action was brought under the Families Compensation Act of British Columbia, which, save in slight and immaterial respects, is in the same terms as the (Imperial) Fatal Accidents Act, 1846, and, like that Act, provides that all actions thereunder shall be commenced within twelve calendar months of the death of the deceased.

The respondent, by her statement of claim, alleged that the accident was caused by the negligence of the appellants' servants and claimed damages for the benefit of the father and mother of the deceased person.

The appellants, by their defence, denied negligence and relied on s. 60 of the special Act above referred to, which provided: "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards."

The respondent with regard to this defence pleaded by her reply that the appellants as assignees of the Consolidated Railway Company were not entitled to the benefit of s. 60 of the special Act, and that the action was not one to which the section applied. She further pleaded that by virtue of s. 5 of the Families Compensation Act she was entitled to bring the action within twelve calendar months of the death of the deceased, notwithstanding the provisions of s. 60 of the special Act.

The action was tried before Morrison J. and a jury on October 30, 1912, when a verdict was found for the respondent for $3000, and the learned judge, being bound by the decision of

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the Full Court of British Columbia in *Green* v. *British Columbia Electric Ry. Co.* (1), to the effect that the twelve months' period of limitation provided by the Families Compensation Act was not affected by s. 60 of the Consolidated Railway Company's Act, 1896, gave judgment for the respondent for that sum.

Upon appeal, the Court of Appeal (Macdonald C.J., Irving, Martin, and Galliher JJ.) affirmed this decision, the Court declining to interfere with the verdict on the facts and the majority (Martin J. dissenting) considering themselves bound by the decision of the Full Court above referred to. The question whether the appellants, as assignees, were entitled to the benefit of s. 60 had by previous decisions binding upon the Court (including *British Columbia Electric Ry. Co.* v. *Crompton* (2)) been settled in favour of the appellants and was not specifically dealt with.

Clauson, K.C., and *Branson*, for the appellants. The time limit for bringing an action under the Families Compensation Act of British Columbia, namely twelve calendar months, is further limited to six months in the present case by s. 60 of the appellants' special Act. The action is in respect of an injury sustained by reason of the tramway or the works or operations of the appellants within that section, and it is not the less so because the injury was due to the negligent operation of the tramway: *Northern Counties Investment Trust* v. *Canadian Pacific Ry. Co.* (3); *Canadian Northern Ry. Co.* v. *Robinson.* (4) The question of limitation now arising was decided against the appellants by the Full Court of British Columbia (Martin J. dissenting) in *Green* v. *British Columbia Electric Ry. Co.* (1), which followed *Zimmer* v. *Grand Trunk Railway* (5), and was itself followed in the present case and, by the Supreme Court of Canada, in *British Columbia Electric Ry. Co.* v. *Turner.* (6) The view taken by the Court in *Green's Case* (1) was that the limitation provision contained in the Families Compensation Act was not affected by that contained in the company's special Act, since the latter

(1) (1906) 12 Brit. Col. Rep. 199.
(2) (1910) 43 Can. S. C. R. 1.
(3) (1907) 13 Brit. Col. Rep. 130.
(4) [1911] A. C. 739.
(5) (1892) 19 Ont. App. Rep. 693.
(6) (1914) 48 Can. S. C. R. 470.

provision was a general limitation passed for the benefit of a private corporation. This view is erroneous and is not supported by authority. The appellants' contention that the provision for limitation in their special Act is effective is, however, supported by English and Irish authorities. In *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1) a Divisional Court held that an action under Lord Campbell's Act, commenced within twelve months of the death of the deceased, was barred by reason of the six months' limitation provided by the Public Authorities Protection Act, 1893, s. 1 (*a*), and the Irish decision in *Gawley* v. *Belfast Corporation* (2) was to the same effect. The terms of the limitation provision in the Public Authorities Protection Act, 1893, do not differ from those employed in s. 60 of the appellants' Act in any manner which would render those decisions inapplicable to the present case. It is true that in *Blake* v. *Midland Ry. Co.* (3), *Pym* v. *Great Northern Ry. Co.* (4), and *Seward* v. *Vera Cruz* (*Owners of*) (5) it was held that the cause of action under Lord Campbell's Act was a new cause of action and different from that which the deceased would have had. Those decisions, however, were not with regard to the present question, and they do not preclude in any way the contention that the new cause of action was one falling within s. 60 of the special Act and subject to the six months' limitation therein provided. The effect of the decision in *Read* v. *Great Eastern Ry. Co.* (6) is that the cause of action under Lord Campbell's Act was the defendants' negligence, and Blackburn J. observed that though s. 2 of that Act provides a new principle for the assessment of damages, it does not give any new right of action. *Griffiths* v. *Earl of Dudley* (7) is to the same effect. The Families Compensation Act, like Lord Campbell's Act, makes it a condition precedent to a right of action thereunder that the deceased person (if death had not ensued) would have been entitled to maintain an action. The time for applying this test is the date at which the action is commenced. In *Williams* v. *Mersey*

(1) [1900] 2 Q. B. 454.
(2) [1908] 2 I. R. 34.
(3) (1852) 18 Q. B. 93.
(4) (1863) 4 B. & S. 396.
(5) (1884) 10 App. Cas. 59.
(6) (1868) L. R. 3 Q. B. 555.
(7) (1882) 9 Q. B. D. 357.

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Docks (1) the right of action which the deceased would have had was barred at the time of his death, and that disposed of the case, but Mathew L.J. in his judgment treats the commencement of the action as the time at which it is essential that the deceased would have been able to maintain an action. The decision in *Robinson* v. *Canadian Pacific Railway* (2) is distinguishable, since the ratio decidendi in that case was that, the right of action being given by an article in the Code of Lower Canada, the limitation applicable was to be sought only in that article of the Code. [The following were also referred to: *McDonald* v. *British Columbia Electric Ry. Co.* (3), *Sayers* v. *British Columbia Ry. Co.* (4), *Kent County Council* v. *Folkestone Corporation* (5), and *British Columbia Electric Ry. Co.* v. *Crompton.* (6)]

E. P. Davis, K.C., and *Hon. M. Macnaghten*, for the respondent, were not called upon.

1914 *June* 16.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The appellants are a company working the tramways in the streets of the city of Vancouver. This they do as assignees of the Consolidated Railway Company incorporated by c. 55 of the Acts of British Columbia, 1896. The respondent is the administratrix of Vernon Aldrich, deceased, who was struck and killed by one of the appellants' cars on October 7, 1911.

The respondent raised action on behalf of the father and mother of the deceased on June 10, 1912, in virtue of the provisions of the Families Compensation Act, c. 82 of the Revised Statutes of British Columbia. In the statement of claim the plaintiff averred that the death of Vernon Aldrich was caused by the negligence of the servants of the defendants.

The defendants denied negligence and joined issue on the fact. They also pleaded that the action was barred, not having been commenced within six months of the death of the deceased. This plea they rested on the terms of s. 60 of the Consolidated Railway Act, which is in the following terms:—"All actions or

(1) [1905] 1 K. B. 804.
(2) [1892] A. C. 481.
(3) (1911) 16 Brit. Col. Rep. 386.
(4) (1906) 12 Brit. Col. Rep. 102.
(5) [1905] 1 K. B. 620.
(6) 43 Can. S. C. R. 1.

suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act."

The case came before a jury. The learned judge repelled the plea founded upon s. 60 and the jury found a verdict for the plaintiff and assessed damages at $3000, which sum the judge then directed should be paid, $2000 to the father and $1000 to the mother of the deceased man.

The defendants appealed to the Court of Appeal, repeating their plea founded on s. 60, and further contending that the verdict was contrary to the evidence. The Court of Appeal affirmed the judgment of the Court below, but granted leave to appeal to this Board. The question of the verdict being contrary to the evidence was not argued before, and would not have been entertained by, their Lordships. The whole question is, therefore, whether the action was barred as being raised too late.

To get the benefit of the limitation expressed in s. 60 the appellants must shew that the present suit is one for "indemnity for damages sustained by reason of the railway or the operations of the company." Indemnity obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company. Their Lordships assume without deciding that the words "operations of the company" include negligent driving of a car.

The question therefore comes to turn on whether a suit raised in virtue of the provisions of the Families Compensation Act answers to the description above set forth.

The Families Compensation Act is for all practical purposes textually the same as the Act known as Lord Campbell's Act in the United Kingdom, of which Act it is indeed a copy. Now the

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character of the right given by Lord Campbell's Act has been the subject of much judicial decision. As early as 1852, in the case of *Blake* v. *Midland Ry. Co.* (1), Coleridge J., giving the judgment of the Court, said: "But it will be evident that this Act does not transfer this right of action" (of the deceased) "to his representative, but gives to the representative a totally new right of action, on different principles." Then in the case of *Pym* v. *Great Northern Ry. Co.* (2) Erle C.J. said: "The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle." In his judgment Williams and Willes JJ. and Bramwell and Channell BB. concurred. And, finally, in the case of *Seward* v. *Vera Cruz* (*Owners of*) (3) Lord Selborne L.C. said: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim 'actio personalis moritur cum persona,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor." And Lord Blackburn said: "I think that when that Act is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as pointed out in *Pym* v. *Great Northern Ry. Co.* (2), is new in its species, new in its quality, new in its principle, in every way new."

These dicta are in their Lordships' opinion directly applicable to the Families Compensation Act. It follows that, in their opinion, a suit brought under the provisions of that Act is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants, and that s. 60 has no application. They do not agree with the reasoning of or the result arrived at in the case of *Markey* v. *Tolworth Joint*

(1) 18 Q. B. 93, at p. 110. (2) 4 B. & S. 396, at p. 406.
(3) 10 App. Cas. 59, at pp. 67 and 70.

Isolation Hospital District Board (1), which they consider directly in conflict with the law as laid down in the *Vera Cruz Case* (2) in the House of Lords. This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."

Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, i.e., successfully maintained, his action, then the action under the Act does not arise. Therefore when the deceased had already been compensated and discharged all claims (*Read* v. *Great Eastern Ry. Co.* (3)), or had covenanted away his rights (*Griffiths* v. *Earl of Dudley* (4)), he was not in a position to "maintain an action." This is the ground on which Blackburn J. (as he then was) in the former case expressly puts his judgment. Their Lordships feel bound to add that, in their opinion, the remark which follows has been misunderstood. Blackburn J., after commenting on s. 1, goes on to say that s. 2 does not give a "new right of action." That means in law beyond what is given by s. 1. But it has been interpreted in a wider sense by Field and Cave JJ. in *Griffiths' Case.* (4) That this is erroneous is best appreciated by remembering that Lord Blackburn himself used the emphatic words quoted above in the *Vera Cruz Case* (2) a few years after he pronounced the judgment in *Read* v. *Great Eastern Ry. Co.* (3), and that when the erroneous view of the latter case was

(1) [1900] 2 Q. B. 454.
(2) 10 App. Cas. 59.
(3) L. R. 3 Q. B. 555.
(4) 9 Q. B. D. 357.

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urged in argument he quoted the words above cited from the older case of *Pym* v. *Great Northern Ry. Co.* (1)

It follows from what their Lordships have said that the dicta in the case of *Green* v. *British Columbia Electric Ry. Co.* (2) cannot be supported in their entirety. Since that case was decided, however, the case of *British Columbia Electric Ry. Co.* v. *Turner* (3) has been decided by the Supreme Court of Canada, and their Lordships have been furnished with a transcript of the judgments. The views of the learned judges—subject to one point to be presently noticed—seem to their Lordships in accordance with the views now expressed. The learned Chief Justice says specially of the action, "In one sense it is a new action, but the condition, subject to which that right of action may be exercised, being that the deceased did not receive indemnity or satisfaction during his lifetime to that extent, and in that respect it is a representative or derivative action."

The other judges base their opinion on the same view, although they partly also go on the view expressed in *Green's Case.* (2) In the only point of difference between them their Lordships agree with the view expressed by Anglin J. That learned judge says: "I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation."

In their Lordships' view this is correct, and the case of *Williams* v. *Mersey Docks* (4) was rightly decided. As to the case of *British Columbia Electric Ry. Co.* v. *Turner* (3) it is scarcely necessary to add that their Lordships are in entire accordance with the view there given effect to, namely, that the raisers of the action under the Families Compensation Act have a title to set aside a release obtained from the deceased man by fraud.

Applying these views to the facts of the case the deceased man had at the moment of his death in no way forfeited or parted

(1) 4 B. & S. 396.
(2) 12 Brit. Col. Rep. 199.
(3) 48 Can. S. C. R. 470.
(4) [1905] 1 K. B. 804.

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with the right of action competent to him for the injury done him. His death took place and the action on the part of the respondent sprang into being. It was raised within twelve months after the death and is therefore competent.

The result is that in their Lordships' opinion the decision of the Court below was correct, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Addison, Linklater & Brown.*
Solicitors for respondent: *Armitage, Chapple & Macnaghten.*

[PRIVY COUNCIL.]

J. C.*
1914
May 18, 19; *July* 6.

DAVIES . . . . . APPELLANT;

AND

JAMES BAY RAILWAY COMPANY. . . . RESPONDENTS.

[AND CONSOLIDATED CROSS-APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canadian Railways—Compensation for Lands taken—Minerals—Right of Support—Railway Act (*R. S. Can.*, 1906, *c.* 37), *ss.* 155, 170, *and* 171.

The effect of the Railway Act of Canada (R. S. Can., 1906, c. 37) with regard to the expropriation of land by a railway company differs from that of the Railways Clauses Consolidation Act, 1845, in that under the former Act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line. Under the Canadian Act the owner of minerals is entitled to compensation for the loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to be ascertained as at the date of the deposit of plans, and once for all.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario (April 21, 1913) reducing an award of arbitrators appointed under the Railway Act of Canada (R. S. Can., 1906, c. 37).

* *Present:* VISCOUNT HALDANE L.C., EARL LOREBURN, LORD MOULTON, LORD SUMNER, and SIR GEORGE FARWELL.

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The respondents, the James Bay Railway Company, were incorporated by an Act of the Dominion Parliament, the name of the company, subsequently to the commencement of the proceedings, being changed to the Canadian Northern Ontario Railway Company.

The respondents in February, 1909, served on Robert Davies (hereinafter referred to as the appellant) a notice of expropriation under the Railway Act of Canada, in respect of certain lands belonging to him in the Province of Ontario. The majority of the three arbitrators appointed under the Act made an award of $238,583 in the appellant's favour. Various questions of law and fact arose as to the amount awarded, but, under an agreement between the parties, the sole question ultimately submitted to their Lordships upon the appeal was as to the appellant's right to recover compensation in the arbitration in respect of shale lying under and adjacent to the track of the railway. This question depended upon the construction of the provisions of the Railway Act of Canada, more particularly upon ss. 155, 170, and 171. (1)

(1) The Railway Act (R. S. Can., 1906, c. 37), s. 155: "The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers."

Sect. 170: "The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

"(2.) All such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby."

Sect. 171: "No owner, lessee or occupier of any such mines or minerals lying under the railway or any of the works connected therewith, or within forty yards therefrom, shall work the same until leave therefor has been obtained from the Board.

"(2.) Upon any application to the Board for leave to work any such mines or minerals, the applicant shall submit a plan and profile of the portion of the railway to be affected thereby, and of the mining works or plant affecting the railway, proposed to be constructed or operated, giving all reasonable and necessary information and details as to the extent and character of the same.

"(3.) The Board may grant such

It was admitted in the appeal that shale is a mineral within the meaning of ss. 170 and 171 of the Railway Act, that the shale in question could only be got by means of surface workings, and that it must be left practically unworked in order to support the surface occupied by the track of the respondents' railway.

The majority of the arbitrators awarded to the appellant the value of the shale under the track and of so much as they considered was required to be left to support the track, but disallowed the appellant's claim for the balance of the shale in the forty yards limit referred to in s. 170 of the Railway Act.

Upon appeal to the Court of Appeal for Ontario the award was reduced to $122,171, disallowing altogether the appellant's claim in respect of the shale. The judgment of the Court was delivered by Hodgins J. and expressed the view that the appellant was not entitled to compensation in the arbitration in respect of subjacent or adjacent minerals, but that he might apply to the Board of Railway Commissioners under s. 171 of the Railway Act for leave to work them, and if the Board should refuse leave, the Board had power under the Act to order compensation to be paid by the respondents to the appellant at that time.

The appeal, which was originally argued on December 11 and 12, 1913, was re-argued on May 18 and 19, 1914.

Sir R. Finlay, K.C., *A. W. Ballantyne*, and *Geoffrey Lawrence*, for the appellant. The appellant is entitled to compensation in these proceedings in respect of the interference with his unrestricted right to work the shale in and under the respondents' track and in and under forty yards on either side of it. The judgment of the Court of Appeal was based upon the English authorities as to the effect of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). The provisions of that Act with regard to minerals are different from those of the

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application upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such other works be executed, or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations."

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Railway Act of Canada, and are framed upon a different principle. Sect. 170 of the Canadian Act is substantially the same as s. 77 of the English Act, but the latter section is followed by provisions dealing with the rights of the parties at the time when the owner desires to work the minerals. The only provision in the Railway Act of Canada for payment of compensation is in s. 155, and there is no section of that Act which empowers the Board of Railway Commissioners to ascertain and direct payment of compensation for minerals when the owner desires to work them. The compensation recoverable under s. 155 includes the injurious affection of the property of the owner of subjacent or adjacent minerals by reason of the interference with his right to work them and is recoverable immediately and once for all. In the present case the shale could only be got by surface working, and it must be assumed that the Railway Board would not grant leave to the owner under s. 171 to work so much of it as was necessary for the support of the railway track. The appellant is, therefore, entitled to recover in respect of the shale the amount awarded by the majority of the arbitrators.

In *Howley Park Coal and Cannel Co.* v. *London and North Western Railway* (1) the House of Lords, affirming the decision of the Court of Appeal, held that since s. 78 and the succeeding sections of the Railways Clauses Consolidation Act, 1845, did not apply to minerals outside the forty yards limit, the company had a right to the support of those minerals. Buckley L.J. in his judgment in the Court of Appeal (2) said: "The argument is advanced that if the owner has to give lateral support beyond the forty yards, he must give it without that right to compensation which he enjoys within the forty yards. The answer is that he is not deprived of compensation. It will be an item to be taken into account under the notice to treat. . . . . Without the forty yards, he is entitled to it at once. Within the forty yards, he is not entitled until he gives notice to work." Under the Railway Act of Canada, there being no provision corresponding to s. 78 of the Act of 1845, the owner of the minerals is entitled to immediate compensation in respect of them, whether they are within or without the forty yards limit, so far as they

(1) [1913] A. C. 11. (2) [1911] 2 Ch. 97, at p. 130.

are necessary for the support of the surface. [*Holliday* v. *Wakefield Corporation* (1), *Hammersmith Ry. Co.* v. *Brand* (2), and Railway Act (R. S. Can. c. 37), ss. 26, 28, 30 (*h*), (*i*), 31, 47, 48, 151 (*c*), 166, and 196 were also referred to.]

P. O. Lawrence, K.C., R. B. Henderson, and *Tyrrell Paine,* for the respondents. The respective rights of the railway company and of the owners of minerals are determined by ss. 169 to 171 of the Railway Act, and the arbitrators had no power under the submission to award compensation in respect of the minerals. The compensation payable under s. 155 includes all damage to the owner of the land, or any person interested therein, but until the mine owner wishes to work the minerals he suffers no damage in respect of them. The principle that compensation for injurious affection is payable once for all does not affect the proposition that compensation cannot be obtained till damage arises. Upon the mine owner wishing to work the minerals he can apply under s. 171 to the Board of Railway Commissioners, and that Board, in dealing with the application, has ample power to compensate him for any condition or restriction imposed upon him for the safety of the public. The Board has power under ss. 26 and 59 either to order the company to carry out any works which the Board considers necessary to enable the mines to be worked with safety, or to order the company to make compensation to the mine owner in respect of works or conditions imposed upon him for the public safety. Further, if the Board upon that application considers that the minerals should be left in situ in order to support the line, the Board may order the company to acquire them, whereupon s. 178 would come into operation (since that section applies to taking land vertically, as well as laterally, adjoining) and compensation would be assessed under that section. Until the application is made to work the minerals, it is purely a matter of speculation whether there is any injurious affection; for instance it may be that before it is desired to work the mines a deviation of the line (which is provided for by s. 159, sub-s. 3, s. 167, and s. 178) may have taken place. It cannot be that compensation to the

(1) [1891] A. C. 81, at p. 103.
(2) (1869) L. R. 4 H. L. 171, at p. 223.

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person interested in the minerals is payable upon the taking of the land because, under s. 171, a lessee of the mines is restrained from working them, but there is no provision in the sections relating to notices (namely, ss. 191 to 193) as to the company giving notice to a lessee. [*Jones* v. *Stanstead Ry. Co.* (1), *Corporation of Parkdale* v. *West* (2), *North Shore Ry. Co.* v. *Pion* (3), and *Smith* v. *Great Western Railway* (4) were referred to.]

Sir R. Finlay, K.C., in reply. The argument for the respondents involves that upon an application under s. 171 of the Railway Act the Board has power to assess damage under s. 155, but this is not provided for by the statute. In Canada the general principle of English law, established by *Croft* v. *London and North Western Railway* (5) and later cases, that damage by injurious affection has to be assessed immediately and once for all, applies to subjacent and adjacent minerals.

1914 *July* 6.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This appeal raises a question of importance as to the interpretation of the Railway Act of Canada. The case has been twice argued before the Judicial Committee. At the conclusion of the first argument it became clear that, of several points at first raised, the real one, on which the parties had been so divided as to be unable to come to a settlement, was the point which became by agreement the exclusive subject of argument on the second hearing.

The relevant facts may be stated very briefly. The appellant claimed compensation from the respondents for the compulsory taking of part of the land owned by him in the Don Valley near Toronto. His claim related to several pieces of this land, and included compensation for damage sustained by the exercise of the powers of the railway company. The claim was referred to the arbitration of three arbitrators, who awarded in satisfaction a total sum of 238,583 dollars. On appeal to the Court of Appeal of Ontario this sum was reduced to 122,171 dollars. Both parties

(1) (1872) L. R. 4 P. C. 98.
(2) (1887) 12 App. Cas. 602.
(3) (1889) 14 App. Cas. 612.
(4) (1877) 3 App. Cas. 165.
(5) (1863) 3 B. & S. 436, at p. 453.

have appealed to His Majesty in Council from this decision. The cross-appeal of the respondents related to a claim in respect of a small piece of land which, as the result of arrangements come to after the first hearing, is not now in controversy. The case of the appellant on the second hearing was exclusively concerned with his rights as regards the minerals lying under the railway track over the land taken, and with certain minor matters which, including a question as to adjacent minerals, have been disposed of by the agreement of counsel. The remaining issue was, at the close of the first hearing, reduced to one of principle determining the compensation to be made. If the appellant is not to be paid for shale under the right of way (meaning the track of the railway), the award is to be for 119,831 dollars, while if he is to be so paid, the award is to be for 230,820 dollars.

The question which thus arises for decision relates to the basis of compensation, and depends on the construction of the Railway Act of Canada. Under this Act the respondents took such land of the appellant as was required for the purposes of the track. Under it is shale of considerable value. It is agreed that this shale can only be got by surface working, and in addition must be left practically entirely unworked in order that the surface occupied by the railway may be supported. Because the appellant was practically deprived of his right to mine for this shale the arbitrators agreed that he was entitled to be compensated for the injury thus inflicted on him. The Court of Appeal, on the other hand, took the view that as the respondents had not bought the minerals their value could not be taken into account in the present proceedings, but ought to be taken into account if the appellant applied hereafter to the Board of Commissioners established under the Railway Act for permission to work the shale. The reasons for this divergence of view will appear when their Lordships refer to the provisions of the Railway Act.

Before doing so it will be convenient, as the analogy of the law of England, and particularly of the Railways Clauses Consolidation Act, 1845, has been much referred to in the arguments, both in the Court below and before the Judicial Committee, to state what that law is, not only apart from, but as affected by, that

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Act. It is the more desirable to do so because the Railway Act of Canada is framed on a scheme which is in many respects different from the scheme adopted in England. In Canada the conditions to which railway construction is subject are different from those which prevail here, and the differences appear to have been carefully kept in view by the Dominion Parliament when deciding on the scheme of the Railway Act.

Apart from the English Railways Clauses Consolidation Act, when land is sold with a reservation of the minerals to the vendor, he cannot, in the absence of special bargain, work them so as to let down the surface which he has sold. The reason is that there is a natural right of support for the surface which passes to the purchaser when he buys it. Although the vendor retains the minerals and the right to work them, he can exercise this right only at his own risk. It is inaccurate to say that the purchaser buys, in addition to the surface, an easement of support for that surface. He acquires the right of support, not as a separate easement, but as a natural feature of the title to his land. The value of this necessary right, which is incident to his ownership, is thus prima facie included in the price which he has paid.

Such is the common law both in England and Ontario, but in England it has been completely altered in the cases to which they apply by ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845. Under these sections, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals, the owner may work them in the fashion which is usual in the district, and even by open working in a way which may destroy the railway. He may let down the surface, for the natural right of support has been taken from its owner. But he must before working give the company thirty days' notice of his intention, and the company may, then or thereafter, if it is willing to pay compensation, give him a counter-notice, and so, on paying compensation, stop the working. These provisions are valuable to the company, for they enable it to

defer finding capital for the purchase of the minerals under the land until, for the sake of safety, it becomes necessary to do so. On the other hand, the mine owner is, for a time at least, free to work, though the amount he receives as the price of the surface is diminished by the taking away from it of the incidental and natural right to support. If the owner claims on a compulsory sale of the surface for injurious affection of his title to the minerals, the answer to him is that his title is not at present injuriously affected inasmuch as he can work freely until he receives a counter-notice, after which he may be able to claim full compensation for the minerals themselves.

In the Dominion of Canada the law has been differently moulded. Their Lordships have given much consideration to the group of clauses in the Railway Act which deal with the policy adopted, and they think that their effect is as follows: The company which acquired the surface was not, as by the English Act, deprived of the natural right to support from subjacent and adjacent minerals. It was, on the other hand, put on terms to compensate the mineral owner at once for loss of value arising from the liability to support which rested on him after severance of the titles to the minerals and to the surface. This compensation having been paid, the mineral owner was, by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. These conditions, in the case of adjacent minerals, might be very easy. In such a case, just because the Board was likely to leave him comparatively free to work his mines, the initial compensation would be small. And where the minerals lay under the railway, and especially where they could only be won by surface working destroying the railway track, the compensation awarded initially would be heavy, inasmuch as the title to the minerals and their present value for working or for sale would be materially impaired. Their Lordships recognize that considerations may have presented themselves to the Parliament of Canada quite different from those which presented themselves to the Parliament of Great Britain. In the latter country comparatively little land was

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available, and a different scheme from that adopted might have placed a heavy burden of finding immediate capital on the railway companies, and might also have unnecessarily interfered with the liberties of many mineral owners in the comparatively small areas dealt with. In Canada, on the other hand, where the railways were likely to extend over great stretches of undeveloped country, it may well have been wisest to proceed on the footing that mineral rights were likely to be less frequently of immediate practical importance and would be less often asserted. It would, in this view, be natural to let the railway companies assume at once under such circumstances liability to compensate for injurious affection of title to minerals, while, on the other hand, the mineral owner, whose title had been so affected, was placed under restrictions to be imposed when he, if he ever should, desired to proceed to work. The discretion was entrusted to the Railway Board, a judicial body intended to be presided over by a judge and to have the assistance of experts.

If this be the result of the Canadian legislation it was proper to take the course which the arbitrators took in the present case, and to award compensation for injurious affection.

Their Lordships now turn to the sections on which their view of the question of principle is founded. Sect. 26 defines the jurisdiction of the Commission. It is to decide on complaints that any company or person has failed to do any act, matter, or thing required to be done by the Act or the special Act, or by regulations, orders, or directions made under the Act, or that any act, matter, or thing has been done in violation thereof. By s. 151 the company may purchase any land or other property necessary for the construction, operation, or maintenance of the railway. Sect. 177 enacts restrictions on the quantity of land so to be taken. Sects. 169 to 171 relate to mines and minerals. The company is not (s. 169), without the authority of the Board, to locate the line of its proposed railway or construct the same so as to obstruct or interfere with or injuriously affect the working of or the access to any mine then open, or for the opening of which preparations are being lawfully made. The company is not (s. 170), unless the same have been expressly purchased, to be entitled to any mines or minerals

under lands purchased or taken by it under the Act, except such parts as are necessary to be dug, carried away, or used in construction. No owner, lessee, or occupier (s. 171) of any such mines or minerals lying under the railway or its works, or within forty yards from them, is to work the same unless leave has been obtained from the Board. On any application to the Board for leave to work, the applicant is to submit full plans. The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seems expedient, and may order that such other works be executed or measures be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. The provisions as to compensation are to be found in s. 191 and the following sections. Plans, profiles, and books of reference are to be deposited, and then application may be made to the persons who are the owners of, or interested in, lands (which by the definition section are defined in terms wide enough to include mines) to be taken, or which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and thereupon agreements may be made touching the lands or the compensation to be paid for the same, or the damages, or as to the mode in which such compensation is to be ascertained, and there may be a reference to arbitration. The amount of compensation or damage is, by s. 192, to be ascertained as at the date of the deposit. By s. 193 the notice served is to contain a description of the lands to be taken or of the powers intended to be exercised in regard to them, and a declaration of readiness to pay a certain sum or rent as compensation for the lands or the damages.

The sections referred to are those which appear to be most important for the purposes of the present question. Their Lordships interpret them as meaning that there is to be an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. In default of agreement they think that the entire amount of compensation is to be ascertained by the arbitrators as at the

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date of the deposit of the plans and once for all. For the rest the mine owner remains entitled to his minerals but subject to any obligation of natural support which attaches on severance. The Board is to regulate the exercise by him of his remaining rights in the future, and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public. If the Board refuse him leave to work, his grievance is against the Board, to whom, and not to the railway company, his application is to be made. The principle on which the Legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Their Lordships do not think it necessary to decide whether, either in s. 26, or in s. 59, which relate to the powers of the Board to direct the construction of buildings and works on proper terms as to compensation, or in s. 171, or elsewhere in the Act, any power can be found which enables the Board to award to the owner of mines and minerals, who has applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. It may be that the Legislature has thought it right to give no such power. The only point which it is either necessary or proper to decide now is that power to award compensation as between the railway company and the owner of subjacent or adjacent mines for injurious affection of the title to the minerals has been entrusted to the arbitrators. The principle adopted is, as has been already observed, one which in the case of a country of great extent, with its minerals widely scattered, might not improbably commend itself as more adapted to the circumstances than the principle of the English statute. At all events this is the principle which the language of the statute appears to lay down.

Their Lordships have examined the reasoning of the careful judgment of Hodgins J., as delivered on behalf of the Court of Appeal, in which the decision of the arbitrators was reversed. There are two main grounds on which, after consideration, they find themselves unable to concur in his reasoning. They think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the

duty of support which on severance the law imposed on him, and that so far as the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly so because it could only be worked from the surface. It is no answer that the owner probably did not desire to get at his minerals at once. His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly. They are further, for the reasons already given, of opinion that even if they were satisfied of the correctness of the view of the learned judge on the other point, they ought not to treat it as arising at present. That view was that the Board has the power, upon the application of the mineral owner, to order the railway company to "acquire such part of the minerals as in England would be covered by the counter-notice of the railway company; or to put it in another form, to so support and maintain their line, and to acquire the necessary land and minerals for that purpose." They are not, as at present advised, prepared to express the opinion that the Canadian Act has substituted for the English system of notice, counter-notice, and compensation the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the railway company by its order. It appears to their Lordships that it may well be that the powers of the Board to impose conditions on the action of the mineral owner are conferred for a wholly different purpose, and do not extend to the making of any such order. But they hold that the question does not arise for immediate decision if it is once established that injurious affection has occurred to the extent of depriving the mineral owner of the present value of his subjacent minerals by the imposition of the duty of support and the taking away of the right of surface working. They think that the arbitrators in substance dealt with the question of compensation on a proper principle. As to adjacent minerals no controversy arises.

In the result their Lordships think that the appellant was entitled to be awarded compensation for loss of title, a loss substantially equivalent under the circumstances to the value of the shale. They hold that the arbitrators were bound to take this loss into account in assessing the compensation to be paid, and

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that the respondents must therefore pay to the appellant the agreed sum of 230,820 dollars, and they will humbly advise His Majesty accordingly.

As the appeal has resulted in a settlement of other questions in dispute, and as the victory in the litigation is a divided one, they think that the proper mode of dealing with the costs will be analogous to that adopted in the Court of Appeal, and that there should be no costs either of the first hearing of this appeal or of the cross-appeal, or of the hearing in the Court below. The respondents ought, however, to pay to the appellant the further costs limited to those occasioned by the attendance of counsel and solicitors at the second hearing before this Board.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Linklater, Addison & Brown.*

[PRIVY COUNCIL.]

Applied. *In re* NAYLOR BENZON MINING Co., Ld. [1950] Ch. 567

J. C.* 1914 *June* 25. 26; *July* 14.

CORRIE AND ANOTHER . . . . . APPELLANTS;

AND

MACDERMOTT . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Compensation—Grant of Land to Society—Limited Purposes—Resumption—"Value of the land."

The Government of Queensland granted certain land to the trustees of the Acclimatisation Society of Queensland, to be used only for the purposes of the society, and with a provision that the Government might resume possession paying "the value of the land." The trustees had power by statute to sell the land, but only to the local authority or to a certain agricultural association, the proceeds to be invested and the income applied to the purposes of the society:—

Held, that upon resumption of the land by the Government, the trustees were not entitled to be paid the unrestricted freehold value of the land, but, in accordance with the ordinary rule as to compensation, the value of the land to the trustees under the conditions upon which they held it.

Hilcoat v. *Archbishops of Canterbury and York* (1850) 10 C. B. 327

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* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and SIR JOSHUA WILLIAMS.

and *Stebbing* v. *Metropolitan Board of Works* (1870) L. R. 6 Q. B. 37 explained.

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APPEAL from a judgment of the High Court of Australia (May 2, 1913) reversing a judgment of the Supreme Court of Queensland (October 18, 1912) upon a special case stated by consent.

The appellants were the trustees of the Acclimatisation Society of Queensland, which was constituted under statute for the purpose of experimenting in the acclimatization of animals and plants. By a deed of grant dated June 17, 1892, certain land was vested by the Government of Queensland in the trustees of the society solely for the purposes of the society. The deed reserved a nominal quit rent payable to the Crown and all mines, and imposed conditions as to draining, with a forfeiture clause in the event of breach. It further contained a clause under which the Crown reserved the right to take possession of the land, or so much as might be required, for any public purpose, "the value of the land being paid to the party entitled thereto at a valuation to be fixed by arbitration."

By the Acclimatisation Society Act, 1907 (7 Edw. 7, No. 6, of Queensland), after reciting that the land granted was unsuitable for the operations and experiments of the society, power was given to the trustees to sell either to the local authority, or to the National Agricultural and Industrial Association, and it was provided that the proceeds should be invested and the income applied to the purposes of the society. Negotiations for a sale to the above association took place, but no agreement was come to. The Government thereupon gave notice to resume possession, and two arbitrators and an umpire were appointed under the deed.

The arbitrators having failed to agree, the umpire made an award dated December 18, 1911. The award found that the value of the land "on the basis of freehold land unrestricted in any way, and as land in fee simple," was 7490*l.*, and that the value of the land, "being required for a public purpose (namely an exhibition ground)," was 3835*l.*; and the umpire awarded the latter sum to the appellants.

The appellants claimed that under the award they were entitled to 7490*l.* and brought an action against the respondent

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as representing the Crown. A case was stated in the action by consent for the opinion of the Court, it being agreed that, if the appellants should be held not to be entitled to 7490*l.*, they should accept 3835*l.* in full discharge.

The terms of the deed and of the award are fully set out in the judgment of their Lordships.

On October 18, 1912, the Supreme Court of Queensland gave judgment upon the special case, holding that the appellants were entitled to the sum of 7490*l.*

The High Court of Australia (Barton A.C.J., with Isaacs, Gavan Duffy, and Rich JJ., Powers J. dissenting) delivered judgment on May 2, 1913, reversing this decision and holding that the appellants were only entitled to 3835*l.*

P. O. Lawrence, K.C., and *Dowson*, for the appellants. Under the terms of the deed of grant the appellants are entitled to "the value of the land," and upon the true construction of the deed those words mean the freehold value of the land in open market. This is not a case in which the amount payable to the owners has to be ascertained under the ordinary principles of compensation; if it were it would be right to take the value to the owners having regard to the restrictions. In the hands of a third party the land, having regard to the purposes for which it was granted, was of no value, and it is for that reason that the deed expressly provides that in the event of resumption the trustees are to receive the value (that is the freehold value) of the land. This is borne out by the inclusion of a clause in the deed providing that if the Government took part of the land there should be a set-off in respect of the betterment to that left. At the time when the land was granted the Public Trusts Lands Resumption Act, 1878, was in operation, and if it was the intention that compensation upon resumption should be assessed upon ordinary principles it was unnecessary to make provision in the deed in respect of it. The trust was imposed upon the land by the Government and upon resumption it would become freed from the trust, and the value has to be assessed upon that basis. The decisions in *Stebbing* v. *Metropolitan Board of Works* (1) and in *Spencer* v.

(1) L. R. 6 Q. B. 37.

The Commonwealth (1), which were relied on in the judgments below, are distinguishable since the statutory powers under which the land was taken were in the former the Lands Clauses Consolidation Act, 1845, and in the latter similar statutory provisions. *Stebbing's Case* (2) is also distinguishable since the land there taken could not be used for any purpose whatever, while in the present case the trustees had a right to let or sell free of the trust. Having regard to that fact the principle laid down in *Hilcoat* v. *Archbishops of Canterbury and York* (3) is applicable and the appellants are entitled to the unrestricted value. That case was approved by Vaughan Williams L.J. in *In re City and South London Ry. Co.* (4) and is supported in principle by the award of Lord Shand in *In re Corporation of Edinburgh and North Western Railway*, referred to in Browne and Allan on Compensation, 2nd ed., App., p. 656. [*London County Council* v. *Churchwardens of Erith* (5) was also referred to.]

Sir R. Finlay, K.C., *Micklethwait*, and *D'Egville*, for the respondent. The land was granted to the appellants for special purposes, and with no power to sell save to two possible purchasers. The contention that upon resumption the Crown has to pay as though the user of the land was unrestricted is contrary to the whole principle of compensation, namely, that the compensation payable is the value to the owner and not the value to the purchaser: *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (6); *In re Lucas and Chesterfield Gas and Water Board* (7); *Manmatha Nath Mitter* v. *Secretary of State for India* (8); *Commissioners of Inland Revenue* v. *Glasgow and South Western Ry. Co.* (9) The terms of the grant, upon their proper construction, do not put the compensation payable upon any different basis to that under the Lands Clauses Consolidation Act, 1845. The grant must be construed according to the principles which govern the law of compensation, and "the value of the land" as meaning the value of the land according to those principles. *Hilcoat's Case* (3) only decided that the jury

(1) (1907) 5 C. L. R. 418.
(2) L. R. 6 Q. B. 37.
(3) 10 C. B. 327.
(4) [1903] 2 K. B. 728, at p. 736.
(5) [1893] A. C. 562.
(6) [1914] A. C. 569.
(7) [1909] 1 K. B. 16.
(8) (1897) L. R. 24 Ind. Ap. 177.
(9) (1887) 12 App. Cas. 315.

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ought not to have been directed that they had to assess the value upon the basis that there was an irrevocable dedication of the land in question; the view that the potential value of the land is to be considered was upheld in *In re City and South London Ry. Co.* (1) Neither of these cases, however, has any material bearing, nor are they in conflict with *Stebbing's Case.* (2) [*In re Morgan and London and North Western Ry. Co.* (3) was also referred to.]

P. O. Lawrence, K.C., in reply.

1914 *July* 14.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The Acclimatisation Society of Queensland is a society constituted under Acts of Parliament for the purpose of carrying out experiments in acclimatization of animals and plants—using the latter word in its widest sense. The society holds land where its experiments are carried out. Such land is held by the society through the medium of trustees, who hold the same in trust for the uses of the society.

By deed of grant of July 17, 1892, the land which forms the subject of this appeal was granted by the Crown to trustees for the society "upon trust for the appropriation thereof to the use and for the grounds of the Acclimatisation Society of Queensland, and for no other purpose whatsoever."

Mines of gold, silver, and coal were reserved to the Crown, and the deed of grant contained also the following clause:—"And we do further reserve unto us our heirs and successors full power for us or them or for the Governor for the time being of our said Colony with the advice aforesaid to resume and take possession of all or any part of the said land which may be required at any time or times hereafter for any public purpose whatsoever twelve calendar months' notice of its being so required being previously given in the Government Gazette or otherwise and the value of the said land or of so much thereof as shall be so required and of any building standing on the said required land being paid by the Government to the party entitled thereto at a valuation fixed

(1) [1903] 2 K. B. 728; [1905] A. C. 1. (2) L. R. 6 Q. B. 37.
(3) [1896] 2 Q. B. 469, at p. 475.

by arbitrators chosen as hereinafter mentioned in which valuation the benefit to accrue to the said party from any such public purpose shall be allowed by way of set off." Then follows an arbitration clause providing for appointment of arbitrators and umpire in common form.

The deed contained no power of sale in favour of the trustees, and no general power of sale of this land is conferred on them by any of the Acts under which the society is governed; but by an Act of 1907 the society was allowed to sell any part of its lands to the local authority, and to the National Agricultural and Industrial Association.

In 1911 the Government resolved to exercise the above narrated power of resumption, and gave the necessary notice. Arbitrators and umpire were appointed, the arbitrators disagreed, and the umpire made his award in the following terms:—"1. I find that the value of the total area of the land proposed to be resumed as aforesaid as set out in the said schedule hereto on the basis of freehold land unrestricted in any way and as land held in fee simple is the sum of seven thousand four hundred and ninety pounds (7490*l.*). 2. I find that there is no building on the said land. 3. I find that the value of the total area of the said land proposed to be resumed as aforesaid as set out in the said schedule hereto being required for a public purpose (namely an exhibition ground) in accordance with the said deed of grant and reference is the sum of three thousand eight hundred and thirty-five pounds (3835*l.*). 4. I find that the value of the benefit to accrue to the said trustees from the said public purpose by way of set off is nil. I award and determine that the valuation of the said land described in the schedule hereto in accordance with the said deed of grant and reference is the sum of three thousand eight hundred and thirty-five pounds (3835*l.*) which amount is the amount I award and adjudge to be paid by the Government to the said trustees being the party entitled thereto."

The Government paid the sum of 3835*l.* and was by arrangement given possession of the land subject to the question of the sum truly due being settled by special case. A case was accordingly presented to the Supreme Court of Queensland in which

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the questions put were as follows: "The questions for the Court are:—

"(1.) What are the rights of the parties under the said determination?

"(2.) Is the said society entitled to the said sum of 7490*l.* mentioned in the said determination?

"If the Court is of opinion that the sum of 7490*l.* in the said determination mentioned is the amount payable by the defendant to the plaintiffs judgment is to be entered for the plaintiffs for the sum of 3655*l.* but if the Court is not of opinion that the said sum of 7490*l.* is the amount payable the plaintiffs are to accept the sum of 3835*l.* already paid in full satisfaction of their claim and judgment is to be entered for the defendant accordingly."

The Supreme Court of Queensland held that the society was entitled to the sum of 7490*l.*, of which 3835*l.* being already paid left a balance due of 3655*l.*, for which sum they gave judgment. Appeal was taken to the High Court of Australia, who by a majority of four to one reversed the judgment of the Supreme Court of Queensland and gave judgment in favour of the defendants. From that judgment the present appeal is to this Board.

If this case be viewed as an ordinary case of compensation their Lordships think that the law is not doubtful. The general principle was restated in the very recent case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1), before this Board, which approved of the general statement by Lord Moulton in the case of *In re Lucas and Chesterfield Gas and Water Board.* (2) The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions, it is a necessary point of inquiry how far these restrictions affect the value. It is evident that in this case, always under the assumption above stated, this view is destructive of the arbitrators' finding for 7490*l.* being applicable; for that value is only upon the view that the ground is "unrestricted in any way."

A good deal of argument seems to have been used in the

(1) [1914] A. C. 569. (2) [1909] 1 K. B. 16.

Court below, and was to a certain extent repeated before their Lordships, upon the supposed discrepancy of principle contained in the judgments in *Hilcoat's Case* (1), as opposed to those in *Stebbing's Case.* (2) In their Lordships' opinion both cases are consistent with the general principle above laid down, and the only difference arose from the application of that principle to different facts.

Hilcoat's Case (1) arose upon the question of an exception to a direction given to a jury. Under an Act of Parliament a railway company was authorized to take the church of St. M. and certain ground attached thereto upon the terms that they should only get possession when with the consent of the bishop of the diocese and the Archbishop of York a price had been fixed—in the fixing of such price regard being had to the cost of getting a new site and erecting a new church and compensating the person entitled to the land not actually forming part of the church, which sum should be held by the two ecclesiastical persons aforesaid for the purpose of procuring a new site and erecting a new church, and for compensating the person entitled as aforesaid. The bishops agreed with the railway company for the sum of 7700*l.* odd and indemnity against any claim by the incumbent. They then offered the incumbent (who was the person entitled to the land not occupied by the church as aforesaid) the sum of 300*l.* This he refused and raised action. The case was tried by Wilde C.J., who directed the jury, first, that the fact of the bishops fixing 300*l.* as a proper sum for compensation did not bind the plaintiff; and second, that they were not bound to estimate the value of the ground to which the plaintiff was entitled, as land irrevocably appropriated to spiritual purposes, of which the plaintiff could make no pecuniary advantage, but that it was competent to them to form this estimate of the value with reference to all the circumstances that had appeared in evidence before them. The jury found for the plaintiff and assessed damages at 1540*l.* Upon a rule being granted the Court held that the directions were right.

It seems quite plain that although, as above said by their Lordships, restrictions must be kept in view, the chance of such

(1) 10 C. B. 327. (2) L. R. 6 Q. B. 37.

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restrictions being discharged must also be kept in view. That was all that was decided in *Hilcoat's Case* (1), and in their Lordships' view rightly decided. Whether under the circumstances of the case the jury did not give too much is quite another matter, and does not affect the principles of the case.

In *Stebbing's Case* (2) the ground taken was part of city churchyards in which any further burial had been prohibited by Order in Council. The rector claimed that he should be paid for his freehold interest in the said churchyards the value of the ground as if it were unrestricted, minus the sum which it would cost to remove the human remains to other ground. The Board of Works (who had taken the ground) contended that the value to be assessed was the value of the ground as it stood in the rector's hands. It was thus decided, and the decision upon principle is strictly right. The case does not disclose whether the arbitrator (who had formulated the contended principles to be decided by special case) eventually settled that the rector's interest was pecuniarily nil. There are doubtless indications in the judgments that that was the view of the judges. In so saying, however, they in strictness went beyond their province. Strictly the rector was entitled to have valued his chance of ever getting the land in his hands in such a condition as could bring pecuniary value. But the valuation under the circumstances might well be nil.

And now it may be remarked that a restriction which prevents selling, though it must be taken into account, and may very well affect the value, does in no way reduce the value to nil. To a judge on the facts in *Stebbing's Case* (2) it might indeed well appear that the value was nil. For the land could not be sold, for it was dedicated to spiritual purposes; and further its use so far as profitable, as, e.g., in the matter of fees, was also exhausted, for the ground was full and no further interments were possible because of the Order in Council. But other circumstances would lead to a perfectly different result, and as an illustration their Lordships would refer to a case which, though not at law, was decided by a judge of authority, the late Lord Shand. A strip of land in the West Princes Street Gardens below the

(1) 10 C. B. 327. (2) L. R. 6 Q. B. 37.

Castle Rock in Edinburgh was taken by the North British Railway under an Act of Parliament under terms of paying compensation to the corporation of Edinburgh, who were the owners of the ground. By Act of Parliament the corporation was prohibited from ever building on the land, or alienating it; but was bound to keep it for all time as a public garden.

Under the circumstances the railway company contended before Lord Shand, who was chosen as sole arbitrator, that the land was worth nothing, and that a mere nominal sum should be paid. The corporation on the other hand maintained that the true compensation was what would provide another strip of exactly the same quality; and as this could only be got by taking Princes Street itself, that the money value must be estimated at what it would cost to buy a strip of Princes Street —the most valuable site in Edinburgh. Lord Shand held both these views to be wrong. He held that, the corporation being restricted, the value could not be measured by the value of unrestricted land in a similar position; but that on the other hand the land was of value to the corporation who enjoyed it with the rest of the adjoining land, for the use of the citizens as a garden, which garden would be so much the less valuable because it was smaller; and he assessed on that view. Their Lordships consider that this judgment proceeded on correct principles.

The appellants, however, argued that the assumption on which all that has been so far said proceeds cannot properly be made; that the present case is not one of ordinary compensation; but that in terms of the words of the bargain the value which is to be paid is the value of the land unrestricted.

Their Lordships cannot accede to this view, and they agree particularly with the reasoning of Isaacs J. on this part of the case. In their opinion it puts upon the word "value" an amplification of the bare word, treating it as if it was "unrestricted value," which it will not bear. And, further, the law of compensation being as they have stated it, namely, the value to the owner as he holds, which law has been so often laid down that it must be held to have been known to the contracting parties, it was, their Lordships think, incumbent on a party who

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wanted the valuation to proceed upon another footing to take care that the words used clearly so expressed it.

The appellants also argued that there must have been some reason for a special clause with a special tribunal being stipulated for in view of the fact that there exist general Acts which give very ample powers of resumption to the Government on payment of compensation in ordinary form. The simple answer to this seems to be that although the powers under the general Acts are very ample they are restricted to actual purposes specified, whereas this clause gave the Government power to resume "for any public purpose whatsoever," a fact which seems amply to account for the presence of the special clause.

It will, of course, be noticed that the third finding of the umpire is based upon an obviously irrelevant consideration. By the form of the question here the only point reserved for consideration is whether the first finding as it stands expresses the correct principle, and parties are agreed and have so argued the case that failing the first they will be content with the sum brought out in the third although the principle upon which it was brought out was erroneous.

For the reasons above stated their Lordships are of opinion that the first finding does not express the value upon which the society are entitled to be paid and that the judgment of the High Court was right. They will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Freshfields.*

[PRIVY COUNCIL.]

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY AND CORPORATION OF THE CITY OF VANCOUVER . . . . . } RESPONDENTS.

J. C.*
1914
May 21;
June 26.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Railways—Powers of Board of Railway Commissioners—Order authorizing Bridges—Cost of Work—Order against Provincial Railway—Ultra Vires—Railway Act (*R. S. Can.* 1906, *c.* 37), *ss.* 59, 237, *and* 238—*British North America Act*, 1867 (30 *Vict. c.* 3), *s.* 92, *sub-s.* 10.

The Corporation of the city of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion railway, applied to the Board of Railway Commissioners for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question a railway company, working wholly within the Province under provincial statutory authority, ran tramways. The Board authorized the work and ordered that a part of the cost of construction should be borne by the provincial company, on the ground that that company would benefit by the alteration :—

Held, that the order, so far as it imposed part of the cost of the proposed work upon the provincial railway company, was not within the powers conferred upon the Board of Railway Commissioners by the Railway Act and was invalid.

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (May 6, 1913) affirming an order of the Board of Railway Commissioners for Canada (October 14, 1912).

The appellants were authorized by a statute of the Province of British Columbia to operate street railways in the city of Vancouver and the neighbourhood. Their railways were local street railways or tramways, wholly situated within the limits of the above Province, and had not been declared to be a work for the general advantage of Canada, or for the advantage of two or

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more provinces, within the British North America Act, 1867, s. 92, sub-s. 10 (*c*).

The respondent railway company was incorporated by a statute of the Province, but its railway, which ran through the city of Vancouver, had been declared to be a work for the general advantage of Canada.

The respondent city corporation made an application to the Board of Railway Commissioners (hereinafter referred to as the Railway Board) for an order authorizing them to carry four streets, which were crossed by the respondent railway company's line on the level, over that line on bridges. Along two of these streets the appellants ran tramways upon tram lines.

As appears from the circumstances stated in their Lordships' judgment, the application was made in connection with a scheme for elevating the grades of the four streets in question. It was not alleged upon the application that the bridges were necessary as a precautionary measure for the public safety.

The Railway Board on October 14, 1912, made an order authorizing the work proposed and apportioning the cost of construction between the two respondents and the appellants, the last named being ordered to pay a part of the cost in connection with the carrying of the two streets, along which their tramways ran, over the line. The operative part of this order is fully set out in their Lordships' judgment.

The appellants obtained leave from the Supreme Court of Canada to appeal to that Court from that part of the order which ordered them to pay a part of the cost of construction.

The Supreme Court of Canada, consisting of the Chief Justice with Davis, Idington, Duff, Anglin, and Brodeur JJ., dismissed the appeal, Duff and Brodeur JJ. dissenting.

Anglin J. (with whose judgment the Chief Justice and Davis J. concurred) was of opinion that, upon the authorities, the Dominion Parliament had power to authorize the Railway Board to make the order, and that the Legislature intended by ss. 237 and 238 (as amended by 9 Edw. 7, c. 32) of the Railway Act to confer jurisdiction on the Railway Board to determine who were "interested persons" and to distribute the cost of works in connection with railway crossings among them.

Idington J. delivered a separate judgment in favour of the respondents.

Duff J. (with whose judgment Brodeur J. agreed) was of opinion that the order, in its application to the appellants, was in relation to a matter falling strictly within the subject-matter "local works and undertakings" assigned to the provincial Legislatures by s. 92, head 10, of the British North America Act, 1867. In his view the part of the order appealed from could not be held to be within the legislative authority of the Dominion as ancillary to its authority over Dominion railways. He rejected the contention that the authorities supported the view that ancillary authority is committed to the Dominion in relation to Dominion railways to adjust the burden of cost of any work authorized or required by the Dominion railway authority among the persons, companies, and municipalities "interested in" or "affected by" the work in question. He also pointed out that the present application was not made for the protection of the public.

The appeal to the Supreme Court is reported at 48 Can. S. C. R., p. 98.

Upjohn, K.C., *Bodwell, K.C.*, and *Gordon Browne*, for the appellants. The jurisdiction of the Railway Board rests upon the Railway Act, but that Act does not justify the order which was made. Upon the true construction of ss. 91 and 92 of the British North America Act, 1867, and s. 8 of the Railway Act, the Railway Board had no jurisdiction over the appellants' railway, which is a purely local tramway, working wholly in the Province under provincial powers, and not declared to be of general advantage to Canada or to two or more of the provinces. The order purports to be made under ss. 237 and 238, but s. 8 (*a*) of the Act does not subject a provincial railway to the group of sections headed "Highway Crossings," of which those sections form a part. The reference to "crossings" in s. 8 (*a*) is to the group of sections headed "Railway Crossings and Junctions." The order was permissive in character and was made with the object of enabling the corporation to alter the grading of the streets and not with a view to the public safety; there is no

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power conferred on the Railway Board by the Railway Act to order any person to bear the cost of an order of this character. If, upon the true construction of the Railway Act, the Railway Board had jurisdiction to make an order against the appellants, then the provisions of the Railway Act giving that jurisdiction are ultra vires the Dominion Parliament, being in relation to a subject-matter assigned to the provincial Parliament by s. 92, sub-s. 10, of the British North America Act, 1867: *City of Montreal* v. *Montreal Street Railway* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (2)

Sir R. Finlay, K.C., *Arthur Page*, and *J. G. Hay*, for the respondents the city corporation. The proceedings before the Railway Board shew that the order was permissive in form because the assent of the electors had to be obtained; it was, in effect, a conditional order to do the work, and s. 47 provides that an order of that character can be made. The Railway Board had express power under s. 237 to order that the streets should be carried over the respondents' railway, which was subject to their jurisdiction. Under s. 59 and s. 237, sub-s. 3, there was power to order the appellants as "interested persons" to bear a part of the cost of construction. The whole of the order made was ancillary and necessarily incidental to the exercise of the powers conferred upon the Railway Board in connection with Dominion railways. The only authority which could direct the lowering of the tracks of the respondents' Dominion railway and the raising of the streets was the Railway Board. For the effective exercise of this authority the Railway Board must have power to direct what works shall be carried out and by whom the cost shall be borne: *City of Toronto* v. *Canadian Pacific Railway* (3); *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (2) The decision in *City of Montreal* v. *Montreal Street Railway* (1) is distinguishable as it related entirely to s. 8 (*b*) of the Railway Act. Sect. 8 (*a*) properly construed applies to provincial railway companies every power in the Act relating to crossings.

A. H. Macneill, K.C., for the respondents the railway company. If the part of the order appealed from is declared to be ultra vires,

(1) [1912] A. C. 333. (2) [1896] A. C. 348.
(3) [1908] A. C. 54.

the whole order should be rescinded: *Grand Trunk Pacific Ry. Co.* v. *Fort William Land and Investment Co.* (1)

The judgment of their Lordships was delivered by

LORD MOULTON. The appellants, the British Columbia Electric Railway Company, Limited (referred to herein as the "tramway company"), are a company operating street railways in the city of Vancouver under powers conferred upon them by an Act of the Legislature of the Province of British Columbia. Their railways are local street railways wholly situated within the Province of British Columbia, and have not been declared to be for the general advantage of Canada or for the advantage of two or more provinces, so that they have not passed into the domain of legislation of the Dominion Parliament.

The respondents the Vancouver, Victoria and Eastern Railway and Navigation Company (referred to herein as the "railway company") are a company owning and operating a railway which has been declared to be a work for the general advantage of Canada. It is therefore under Dominion legislation. Its tracks run through the city of Vancouver, of which the other respondents (hereinafter referred to as "the corporation") are the municipal authority.

The litigation out of which the present appeal arises relates to a portion of the track of the railway which runs along the bottom of a valley with somewhat steep sides, the general direction of which is north and south. That valley is included within the limits of the city of Vancouver, and streets run across and along it, but owing to the inequality of the levels there has been but little building along those streets. One street, known as Raymur Avenue, runs along the valley parallel to the railway track and near to it. Four streets, whose direction is east and west, cross Raymur Avenue and the railway track at right angles. These streets are known as Hastings Street, Pender Street, Keefer Street, and Harris Street. Tracks of the tramway company pass along Hastings Street and Harris Street, and cross the tracks of the railway company by level crossings.

For some time prior to July, 1912, the corporation had under

(1) [1912] A. C. 224.

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consideration a plan for carrying the four streets above referred to across the railway track on viaducts, so as to avoid the gradients due to the low level of the railway track. Owing to their not having decided whether or not they should adopt this plan, they had been unable to grant any of the numerous applications which had been made to them for building permits along those streets, inasmuch as the grades of the streets could not be determined. Early in 1912, however, they passed a by-law authorizing the construction of these four viaducts. Such a by-law required the assent of the citizens to give it validity, and on being put to the vote it failed to obtain the requisite support on account of the great expense that the construction of the viaducts would entail on the corporation.

Under these circumstances the corporation proceeded to apply to the Railway Board for an order authorizing the construction of the viaducts and declaring the respective proportions in which the cost of the bridges, &c., should be borne by the railway company and the corporation. Originally no notice of this application was served upon the tramway company. But at the hearing of the application it was pointed out that inasmuch as the proposed constructions would affect the crossings of the tramway company they ought to be served with a copy of the application. Counsel representing the tramway company were present in the Court at the time and consented to accept service, so that the hearing was continued without interruption. But although the tramway company were thus made parties, their counsel took no part in the discussion except to oppose the contention put forward by counsel on behalf of the respondent railway company, that the tramway company should bear a part of the cost of the construction of the viaducts and the street improvements connected therewith.

At the conclusion of the hearing the Railway Board indicated that they would grant the application of the corporation and apportion the cost of the works among the railway company, the corporation, and the tramway company, and on October 14, 1912, they accordingly made an order the operative part of which is as follows: "It is ordered as follows:—

"1. The applicant is hereby authorised to construct Hastings

Street, Pender Street, Keefer Street, and Harris Street across the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company, in the said city of Vancouver, by means of overhead bridges, as shown on the plan filed with the Board under file No. 20,062, detail plans of the said structures to be submitted for the approval of the chief engineer of the Board.

"2. Twenty per cent. of the cost of the actual construction work at each of the crossings on Pender and Keefer Streets, not to exceed in each case the sum of $5000, shall be paid out of the Railway Grade-Crossing Fund; 25 per cent. of the remainder of the cost of such work shall be borne and paid by the applicant, and 75 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing Harris Street Bridge, not to exceed the sum of $5000, shall be paid out of the Railway Grade-Crossing Fund; 20 per cent. of the remainder of such cost to be paid by the applicant, 20 per cent. by the British Columbia Electric Railway Company, and 60 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing the Hastings Street Bridge shall be paid by the applicant, 20 per cent. by the British Columbia Electric Railway Company, and 60 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

"3. The cost of depressing the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company shall be included in the cost of the work.

"4. The cost of maintaining the said Keefer, Pender, Harris and Hastings Street Bridges shall be borne and paid, 50 per cent. by the applicant and 50 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

"5. In case of dispute between the parties in carrying out the terms of this order, the same shall be settled by the chief engineer of the Board."

The tramway company thereupon applied to the Supreme Court of Canada for leave to appeal to that Court from the above order in so far as the said order directed that the tramway company should pay a portion of the cost of the construction of

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the Harris Street bridge and of the Hastings Street bridge, and duly obtained permission so to appeal on the ground that the Railway Board had no jurisdiction to order the tramway company to pay any proportion of the cost of the bridges and other works mentioned in their order.

The appeal came on before the Supreme Court of Canada on April 7, 1913, and was dismissed with costs by a majority of the judges of that Court, Duff and Brodeur JJ. dissenting. The order dismissing the appeal is dated May 6, 1913, and it is from this order that the present appeal is brought.

Their Lordships entirely agree with the remarks of Duff J. as to the ground and reason of the application of the corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the corporation, he says: "Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised."

It follows therefore that the application was a matter between the corporation and the railway company alone. The tramway company was entitled to be present to see that its interests were not prejudiced by any order which might affect injuriously property belonging to it. But the application was not made against it, nor was it asking any privilege from the Railway Board, so that its presence did not give to the Railway Board any jurisdiction to make this order against it. If the Board possessed any such jurisdiction it must be derived from the provisions of the statutes which created it and gave to it its powers. Their Lordships can find nothing in those statutes which

empowers the Railway Board to make any such order against the tramway company. The only portion of the tramway lines which was subject to the jurisdiction of the Railway Board was the actual crossings, and those only so far as concern ss. 227 and 229 of the Railway Act, and these sections have nothing whatever to do with such matters as these street improvements. So far as concerns the cost of the bridges or the cost of lowering the track of the railway company (which by the order was included in the cost of the viaducts) the tramway company was in precisely the same position as any private citizen of the city of Vancouver. It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because they were of opinion that the tramway company would benefit by them. They say: "It being a substantial benefit to them we are of opinion that they should contribute to the cost of the two bridges they will use. That is the bridges at Hastings Street and at Harris Street."

The same language might have been used about a private citizen owning some large shop on one of the streets, or owning premises on either side of the valley, who would profit by the connection being on the level instead of by two steep and opposite grades, and such a private individual would be just as much under the jurisdiction of the Railway Board as was the tramway company. The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefited by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

An attempt was made to treat the order of the Board as being made under the powers of s. 59 of the Railway Act, and it was contended that that section entitled the Railway Board to require that the tramway company should pay a portion of the expense. It is sufficient to point out that the order is not made under s. 59, nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation

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which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of s. 59 relate to a wholly different class of cases.

It is not necessary for their Lordships to deal with any of the other weighty reasons given in the judgment of Duff J. On the grounds above stated they are of opinion that the order so far as it directed the appellant to pay a portion of the costs was made without jurisdiction, and they will humbly advise His Majesty that the appeal should be allowed with costs, and that the order of the Supreme Court should be set aside, and that in lieu thereof an order should be made, with costs, allowing the appeal to the Supreme Court of the present appellants, and setting aside the order dated October 14, 1912, of the Board of Railway Commissioners, in so far as the said order directs that the British Columbia Electric Railway Company, Limited, shall pay a certain proportion, as provided in the said order, of the cost of the construction of the Harris Street bridge and the Hastings Street bridge referred to.

Solicitors for appellants: *Linklater, Addison & Brown.*

Solicitors for respondents: *Blake & Redden; Lawrence Jones & Co.*

[PRIVY COUNCIL.]

DAVID COOK . . . . . APPELLANT;

AND

CORPORATION OF THE CITY OF VANCOUVER . . . . . RESPONDENTS.

J. C.*
1914
May 8, 13; *June* 23.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Riparian Owner—Water Rights in British Columbia—Grant from Crown—Water Clauses Consolidation Act, 1897 (*R. S. B. C.* 1897, *c.* 190).

In British Columbia the common law right of riparian owners to the undiminished flow of the stream is taken away by legislation of the Province. A riparian owner, therefore, who has no grant of the water rights in the stream, or special statutory title thereto, is not entitled to an injunction restraining the exercise of a grant under the Water Clauses Consolidation Act, 1897, of British Columbia, although that exercise diminishes the flow of water to and past his land.

APPEAL, by special leave, from a judgment of the Court of Appeal of British Columbia (November 5, 1912) affirming a judgment of the Supreme Court of that Province (March 6, 1912).

The appellant brought an action claiming an injunction restraining the respondents from continuing to obstruct or divert the water of a stream so as to interfere with the appellant's rights as riparian owner.

The appellant under a grant from the Crown, dated December 9, 1892, was the owner of land in British Columbia bounded by a stream known as Seymour Creek, which at that part of its course ran through a ravine some 250 to 300 feet deep. On December 28, 1906, the respondents obtained a grant from the Crown of water rights (known as a water record) under the Water Clauses Consolidation Act, 1897 (R. B. S. C. 1897, c. 190), entitling them to divert, at a point above the appellant's land, a specified amount of water from the said stream for the purpose of the water system of the city of Vancouver. The appellant opposed the application for the grant, but did not appeal from the decision. The application described the proposed point of

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diversion as being "eleven miles or thereabouts from Burrard Inlet," while the grant described it as "about ten miles from Burrard Inlet." The appellant, who had not obtained any water record in respect of the water in the stream, alleged by his statement of claim that the respondents had obstructed and diverted the water so as to diminish the flow of water to and past his land.

The respondents, by their defence, relied upon their rights under the grant to them.

The action was heard in the Supreme Court of British Columbia before Murphy J., who delivered judgment on March 6, 1912, in favour of the respondents.

The appellant appealed to the Court of Appeal of that Province, which Court (Irving, Martin, and Galliher JJ.A.), by its unanimous judgment delivered on November 5, 1912, affirmed the judgment of Murphy J. Irving J.A. was of opinion that it was impossible to suppose that the Legislature, when it passed the Act of 1897, which recited the Water Privileges Act, 1892, did not intend to break in upon the rights which, at common law, would belong to a riparian owner. Martin J.A., with whose judgment Galliher J.A. agreed, after referring to the statutory provisions and the authorities, came to the same conclusion; in the course of his judgment he said: "It is clear to me that since the right to the use of unrecorded water is formally vested in the Crown, wherein it must remain till it is formally diverted therefrom, a riparian owner must exercise any legal rights to divert or appropriate the water before a valid application for record of it is made by another, and if he does not so preserve his riparian rights, he is prevented from exercising them as regards the water covered by the record granted on that application." The appeal is reported at 17 Brit. Col. Rep. 477.

E. M. Pollock, K.C., and *H. O. Danckwerts*, for the appellant. The respondents by diverting the water from the stream interfered with and infringed the appellant's right, as riparian owner, to the undiminished flow of the stream to and past his land. The riparian rights were not reserved to the Crown in the grant of land to the appellant, nor is the effect of the legislation in the Province to take away from riparian owners their common law

rights. The water flowing past the appellant's land was not "unrecorded water" within the meaning of the Water Clauses Consolidation Act, 1897, s. 4, so as to be vested in the Crown under that section. By s. 2 of that Act "unrecorded water" includes all unappropriated water, but the natural flow of the stream was appropriated to the appellant by reason of the land grant: *Esquimalt Waterworks Co.* v. *City of Victoria Corporation.* (1) The decision by the Supreme Court of Canada in *Martley* v. *Carson* (2) on this point was wrong. Sect. 5 of the Act of 1897 recognizes the existence of riparian rights, and the effect of that section is to prevent the riparian owner from permanently diverting the water, leaving him the right to divert and return it. [*North Shore Ry. Co.* v. *Pion* (3), *Saunby* v. *London (Ontario) Water Commissioners* (4), *Parkdale Corporation* v. *West* (5), *Roberts* v. *Gwyrfai District Board* (6), and Water Act (R. S. B. C. 1911, c. 239), s. 291, were referred to.] The description of the point of diversion in the application was not in accordance with s. 9, sub-s. 2 (*c*), of the Act of 1897, and the variation between the application and the grant on this point was material; these irregularities invalidated the respondents' grant.

Sir R. Finlay, K.C., *J. E. Hay*, and *Maxwell Anderson*, for the respondents. The appellant's land was granted in December, 1892. The grant was, therefore, under the provisions of the Water Privileges Act, 1892, subject to the water rights being vested in the Crown. The respondents were merely exercising the rights duly granted to them under the Water Clauses Consolidation Act, 1897.

[They were stopped by their Lordships.]

E. M. Pollock, K.C., replied.

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June 23.

The judgment of their Lordships was delivered by

LORD MOULTON. In this case the appellant (the plaintiff in the action) claims an injunction against the defendants, who are the Corporation of the city of Vancouver, restraining them from diverting water from a stream flowing through certain lands of

(1) [1907] A. C. 499.
(2) (1889) 20 Can. S. C. R. 634.
(3) (1889) 14 App. Cas. 612.
(4) [1906] A. C. 110.
(5) (1887) 12 App. Cas. 602.
(6) [1899] 2 Ch. 608, at p. 613.

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which he is the owner. The defence is that the defendants are entitled to do the acts complained of by reason of their being the proprietors of a certain water record granted to them, dated September 28, 1906, under and pursuant to the Water Clauses Consolidation Act, 1897, and the Acts amending the same. The plaintiff replies by putting in issue the facts stated in the defence, and the validity and effect of the alleged water grant. In the first instance he also alleged that the Acts under which the alleged water record was granted were ultra vires of the Provincial Legislature, but this issue has not been persevered in.

The facts of the case are very simple and are not in controversy. The plaintiff derives his unquestioned title to the lands through which the stream flows under and by virtue of a Crown grant dated December 9, 1892. The stream passes through the land in a deep canyon which is from 250 to 300 feet below the general level of the ground, but although this may have a substantial effect on the utility of the stream to the lands of the plaintiff, it does not alter the fact that he is riparian proprietor, and therefore possessor of such riparian rights as exist in British Columbia under present legislation.

The defendants are the holders of a grant of water right, dated September 28, 1906, permitting 1400 inches of water to be diverted from Seymour Creek above the plaintiff's land for the use of the waterworks supplying the city of Vancouver with water and other purposes. This grant was made in respect of an application dated December 12, 1905, of which notice was given on November 10, 1905. At the hearing of the inquiry in respect of that application the plaintiff appeared and opposed the grant, but was unsuccessful. He did not appeal against the decision of the Commissioner nor did he take any steps by way of certiorari or otherwise to set aside the grant. In the present proceedings he has, however, taken objection to the validity of the grant on the ground that it was not in accordance with the notice inasmuch as in the grant the diversion is described to be "at a point eleven miles or thereabouts from Burrard Inlet," whereas in the notice it is described as being "about ten miles from Burrard Inlet." This objection is in their Lordships' opinion frivolous. In the first place neither of the descriptions

is intended to be anything more than an approximate description of the point of diversion sufficient for practical purposes of notice, and viewed in this light there is no ground for supposing that there is any inconsistency between the two descriptions. In the next place the notice must have been posted at the point of the proposed diversion so that all difficulty of identification would disappear. And thirdly, s. 15 of the Water Clauses Consolidation Act, 1897, which deals with the record to be granted upon such an application, indicates clearly that the Commissioner may modify the particulars of the grant—a practical provision very necessary in such a case inasmuch as the inquiry might shew that public and private convenience would be better cared for by modification of the details of the application, preserving of course substantial identity.

There exists therefore in this case a valid water record in favour of the respondents, and it is not suggested that they have done anything which is not covered by this record. Whatever rights the appellant may have as riparian proprietor are not of record, and the sole question in the case is whether as riparian owner the appellant has, under existing legislation in British Columbia, any rights superior to or overriding the respondents' rights of record. The learned judge at the trial decided that he has not, and dismissed his action with costs. On appeal to the Court of Appeal of British Columbia that decision was supported.

In their Lordships' opinion the decisions of the Supreme Court of British Columbia and the Court of Appeal of British Columbia were right. The grant under which the appellant holds his land is subsequent in date to the coming into force of the Water Privileges Act, 1892, so that it unquestionably must be read as subject to the provisions of that Act. The effect of that Act is for all the purposes of this caae accurately summed up in the recital of the Water Clauses Consolidation Act, 1897, which reads as follows: "Whereas by the Water Privileges Act, 1892, all water and water power in the Province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the Province, and it was by the said Act enacted that

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no right to the permanent diversion or exclusive use of any water or water power so vested in the Crown should, after the said date, be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed."

It is beyond dispute that the water of Seymour Creek as it passes through the plaintiff's lands was at the date of the Water Clauses Consolidation Act, 1897, "unrecorded water." It was therefore vested in the Crown, and no right to the permanent diversion or to the exclusive use of it could be acquired by any riparian owner by length of use or otherwise than as the same might be acquired or conferred under Act of Parliament. It follows that water rights can only be acquired either by obtaining a record under the Acts which provide for the grant of such rights by the Crown or by a special statutory title. There is no exception in favour of proprietors of lands, and they cannot acquire such rights in any other way. The respondents' rights are of record. They are therefore valid legal rights, and the fact that the appellant is a riparian owner lower down the stream who is affected thereby gives him no right to object to the exercise of those rights.

Their Lordships pronounce no opinion as to the right of a riparian proprietor to make use of the water flowing by his land in a way which does not interfere with recorded water rights of other parties. Riparian rights under English law are of two kinds. First, there is the right to make use in certain specified ways of the water flowing by the land, and, secondly, there is the right to the continuance of that flow undiminished. The second of these classes of rights is clearly taken away by the legislation of British Columbia, but this case does not raise the question whether rights of the first class still remain, and their Lordships do not desire to express any opinion thereon.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Dawes & Sons.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

PASTORAL FINANCE ASSOCIATION, LIMITED . . . . . } APPELLANTS;

AND

THE MINISTER . . . . . RESPONDENT.

J. C.* 1914 May 25; July 3; Aug. 4.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Land resumed by Government—Compensation—Prospective Profits of Business—Public Works Act, 1900 (*No.* 26 *of* 1900, *New South Wales*).

The compensation payable to the owner of land resumed by the Government under the Public Works Act, 1900, of New South Wales is the amount which a prudent man in the position of the owner would have been willing to give rather than fail to obtain it. The special suitability of the land for a business which the owner carries on elsewhere but intends to transfer to the land resumed, and the savings and additional profits which he will derive from so doing, are elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the land.

APPEAL from a judgment of the Supreme Court of New South Wales (March 20, 1913) varying the judgment entered at the trial before Ferguson J. and a special jury.

The action was brought by the appellants claiming compensation under the Public Works Act, 1900, of New South Wales in respect of land owned by them, the Government having notified them that the land had been resumed for a public purpose under that Act.

The land in question fronted on Darling Harbour and had been bought by the appellants about a year before the notification was served on them. They had previously carried on elsewhere the business of dealers in wool and of freezing meat for export. Owing to the expansion of their business they had acquired the land in question with the object of transferring it to that site, though they had not at the date of the notice erected the

* *Present:* LORD MOULTON, LORD SUMNER, and SIR JOSHUA WILLIAMS.

J. C. 1914 PASTORAL FINANCE ASSOCIATION, LIMITED v. THE MINISTER.

necessary buildings there, as they had been informed of the intention of the Government to resume possession. Evidence was given at the trial as to the savings and additional profits which the appellants would make in their business if it were transferred to the land in question as intended.

The learned judge in the course of his summing-up to the jury directed them that they should consider what capital amount fairly represented those savings and profits, and should add that amount to the market value of the land.

The jury returned a verdict for 23,550*l.*, adding a rider that the market value of the land was 9950*l.*, and the learned judge entered judgment for the former sum.

The respondent applied to the Full Court for a new trial or for a reduction of the amount of the verdict, and that Court, by a majority (Pring and Street JJ., Gordon J. dissenting), allowed the appeal and entered judgment for 9950*l.*, being of opinion that the appellants were only entitled to the market value of the land since they had not at the date of the notification commenced to carry on the intended business.

Freeman, K.C., and *Vernon*, for the appellants. The view of the majority of the Supreme Court that the appellants were precluded from obtaining any compensation in respect of the profits and savings which would have arisen upon the transfer of the business because the business had not in fact been transferred is erroneous: *Bailey* v. *Isle of Thanet Light Railways Co.*(1); *White* v. *Commissioners of Public Works.*(2) Under the principles of the law of compensation the appellants were entitled to the value of the land to them arising from its special suitability to their business: *In re Lucas and Chesterfield Gas and Water Board.*(3) The summing-up taken as a whole was a proper direction to the jury. If, however, the Supreme Court considered otherwise a new trial should have been ordered, the appellate tribunal having no power to reduce the jury's verdict without consent: *Watt* v. *Watt.*(4)

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the respondent.

(1) [1900] 1 Q. B. 722.
(2) (1870) 22 L. T. 591.
(3) [1909] 1 K. B. 16.
(4) [1905] A. C. 115.

We do not contend that the fact that the land was not in actual use for the intended purpose precluded the recovery of any special value which it possessed to the appellants. The direction to the jury at the trial, however, as to how they should assess this special value was wrong, since the learned judge told them that they should add the capitalized value of the alleged profits and savings to the market value of the land. The Supreme Court did not reduce the verdict because they considered that it was excessive in amount, but because they were of opinion that the market value was all that the appellants were entitled to. If that view was wrong there should be a new trial and not judgment for the larger amount found.

Freeman, K.C., in reply. The misdirection now relied on by the respondent was not put forward before the Supreme Court nor by his case upon this appeal. It is the ordinary practice of valuers in assessing compensation where a business has been destroyed to ascertain the annual profit and to multiply it by a certain number of years. The verdict and judgment for 23,550*l.* should be restored.

1914
Aug. 4

The judgment of their Lordships was delivered by

Lord Moulton. The appellants, the Pastoral Finance Association, Limited, are a company which has for many years carried on a large business in wool at Kirribilli Point, on the north side of Port Jackson, in New South Wales, and have during late years added thereto the business of freezing meat for export. The business of the association has grown considerably in recent years, and in 1910 that business was so large that it decided to move into new premises, and for that purpose it purchased in March, 1910, a very suitable site, within the city boundary at Jones Bay, having a frontage on Darling Harbour.

Having acquired the land the association procured plans and estimates for erecting thereon buildings adapted to the needs of the whole of its business, which it proposed forthwith to transfer from Kirribilli to the new site. But before actually commencing the erection of these buildings the association learned that Government intended to resume the land. On ascertaining that this was actually the case it desisted from actual building operations.

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1914
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The notice to resume was not in fact given until March 29, 1911, but some months earlier the association had been informed by Government of their intention to resume the land. The association duly served upon the respondent and upon the Crown Solicitor the usual statutory notice setting forth its claim. The Government refused to accept the claim as thus stated by the association, and as the amount of compensation was therefore not agreed between the parties the present action for compensation was brought by the appellants to establish the amount to which they were entitled in respect of the land resumed. The amount claimed in the declaration is 24,235*l*. By his plea the respondent alleged that he had caused a valuation to be made of the estate and interest of the appellants in the lands, and that it amounted to 10,000*l*. No tender or offer of this sum seems to have been made, and in his plea he alleges that the sum exceeds the amount of compensation to which the appellants are entitled in respect of the premises, so that it is probable that no such tender was made.

The case went to trial in the ordinary way before Ferguson J. and a jury. Each side called evidence purporting to shew the effect which the transfer of the business to the new site would have had on the prospective profits of the business, and that evidence referred more especially to the savings which would in future have been made in the new premises by reason of the alleged suitability of the site for carrying on a frozen meat business. It may fairly be said to be common ground that the site had special suitability for the use to which the appellants proposed to put it, the only question being the amount of the savings and increased profits that would result therefrom. The judge went into the evidence with great care in his charge to the jury, and directed them with great fulness as to the law. When the jury retired to consider their verdict counsel for the respondent made an application to him to give certain rulings. This led him to recall the jury and add to his previous charge certain further directions on the lines of those he had thus been requested to give. The jury again retired and finally, after being absent some four hours, they returned with a verdict for the appellants for 23,550*l*., and of their own accord they added by way of rider

that they valued the land at 9950*l.* Upon this verdict the learned judge entered judgment for the appellants for 23,550*l.*, as he was undoubtedly bound to do.

On December 27, 1912, the respondent gave notice of motion before the Full Court asking that the aforesaid verdict should be set aside and a new trial granted, or that the amount of the verdict should be reduced on certain grounds. The motion was heard on May 20, 1913, and the Court by a majority reduced the verdict to 9950*l.* The substantial ground on which the majority of the Court based their decision was that the appellants were not entitled to anything beyond the market value of the land by reason of the fact that they had not as yet erected any buildings thereon, and therefore that the verdict should have been for the mere value of the land which they took to have been fixed by the jury at the above sum.

Their Lordships have no hesitation in deciding that the principle underlying this decision is erroneous. In fact counsel for the respondent did not attempt to support it. The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the appellants to realize the special value they thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the appellants' hands, but it by no means prevented the land having this special value, nor did it interfere with the appellants' right to have that special value duly assessed by the jury, as the amount of the compensation due. Their Lordships have great difficulty in arriving at the meaning of the rider which the jury affixed to their verdict to the effect that they estimated the value of the land at 9950*l.*, but they are satisfied that it was not in law the verdict of the jury, and that therefore no legal effect can be given to it. It was merely a voluntary statement made by them as to the figure at which they had arrived in the course of their deliberations with regard to some matter

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the nature of which cannot be ascertained from the language used by them. It was probably intended to refer to the full market value of the land, but whether that was or was not its meaning is a question of mere guess.

Their Lordships have therefore felt no difficulty in arriving at the conclusion that the decision appealed against must be set aside. But the argument of counsel for the respondent raised difficulties with regard to the judgment at the trial which were of a most serious character. It would appear that the evidence of prospective savings and additional profits given at the trial was put forward in support of a claim that the capitalized value of the increase in the profits of the business due to them should be added to the market value of the land in arriving at the compensation. This view of the law seems to have been accepted by all parties. The evidence on behalf of the respondent related only to the quantum of this addition and the judge in his summing-up said to the jury: "Then you will consider what capital amount fairly represents those savings and those profits and you will add that to the amount that you consider fairly represents the market value of the land independently of these special questions."

Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is

evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

If, therefore, the case had been conducted on behalf of the respondent on different lines at the hearing, or if objection had been taken on the appeal to the charge of the learned judge at the trial on the above grounds, their Lordships would have felt constrained to set aside the verdict and direct a new trial. But in view of the fact that the whole trial was conducted by both sides on the basis that the correct estimate of the compensation was the addition of the properly capitalized savings and additional profits to the market value of the land, that no exception was taken to the ruling of the learned judge in this respect at the trial, that the point was not raised on the appeal to the Full Court or in the respondent's case on the appeal to their Lordships, and that it was first taken in the argument of the respondent's counsel at the hearing of this appeal, their Lordships feel that they would be doing a grave injustice to the appellants if they were to allow the point to be raised at so late a moment and to permit the respondent to recommence the proceedings after they have thus proceeded to their latest stage. Their Lordships therefore will humbly advise His Majesty that the appeal be allowed and that the order of the Full Court be set aside with costs and the judgment of the judge at the trial restored. The respondent will pay the costs of this appeal.

Solicitors for appellants: *Kimbers & Boatman.*
Solicitors for respondent: *Light & Fulton.*

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BUILDING SOCIETY — *Borrowing—Unlimited Borrowing Powers—Banking Business—Ultra vires—Winding-up — Distribution of Assets — Priorities — Shareholders — Depositors — Trade Creditors—Money had and received—Tracing Order—Building Societies Act*, 1836 (*6 & 7 Will. 4, c. 32*), *s. 1.*

A building society formed in 1851 under the Building Societies Act, 1836, and empowered by its rules to borrow to an unlimited extent, started and developed a banking business. In 1911 the society was ordered to be wound up and questions of priority arose between the outside creditors, the unadvanced shareholders, and the bank customers on current and deposit account (for convenience called the depositors). The assets were insufficient for payment of all the claimants in full but were more than sufficient for payment of the outside creditors (who were subsequently paid by arrangement) and the shareholders :—

Held, (1.) that the power to borrow must be limited to borrowing for the proper objects of the society, and that the carrying on of the banking business was ultra vires. (2.) Distinguishing *In re Phœnix Life Assurance Co.* (1862) 2 J. & H. 441, and *Flood* v. *Irish Provident Assurance Co.* (1910) 46 Ir. L. T. 214; [1912] 2 Ch. 597, n., that the depositors were not entitled to recover moneys paid by them on an ultra vires contract of loan on the footing of money had and received by the society to their use. (3.) Applying the principle of *In re Hallett's Estate* (1880) 13 Ch. D. 696, that the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the depositors could follow as having been invalidly borrowed, and in part moneys which the society could follow, as having been wrongfully employed by its agents in the banking business, and (subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, and to the costs of the liquidation) ought to be distributed pari passu between the depositors and the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up.

In re Guardian Permanent Benefit Building Society (1882) 23 Ch. D. 440 considered and distinguished.

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—— *Bradley* v. *Carritt* - [1903] A. C. 253
The dicta of Lord Lindley on one point in, preferred to the dicta of Lord Macnaghten and Lord Davey. G. AND C. KREGLINGER *v.* NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LIMITED - - - [1914] **A. C. 25**

—— *Bristol Guardians* v. *Bristol Waterworks Co.* [1912] 1 Ch. 846.
Affirmed - - [1914] **A. C. 379**

—— *Cababé* v. *Walton-on-Thames Urban District Council* [1913] 1 K. B. 481.
Affirmed - - [1914] **A. C. 102**

—— *Charlesworth* v *Mills* - [1892] A. C. 231
Distinguished. DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY [1914] **A. C. 823**

—— *Close, Ex parte* - (1884) 14 Q. B. D. 386
Distinguished. DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY [1914] **A. C. 823**

—— *Consolidated London Properties, Limited* v. *St. Marylebone Assessment Committee* [1913] 3 K. B. 230.
Affirmed *sub nom.* ST. MARYLEBONE ASSESSMENT COMMITTEE *v.* CONSOLIDATED LONDON PROPERTIES, LIMITED - - [1914] **A. C. 870**

—— *Cunningham & Co., In re* (1885) 28 Ch. D. 682.
Distinguished. DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY [1914] **A. C. 823**

—— *Derry* v. *Peek* - (1889) 14 App. Cas. 337
Referred to. NOCTON *v.* LORD ASHBURTON - [1914] **A. C. 932**

—— *Dillet, In re* - (1887) 12 App. Cas. 459
Referred to. ARNOLD *v.* KING-EMPEROR - - [1914] **A. C. 644**

—— *Dublin City Distillery (Great Brunswick Street, Dublin), Limited* v. *Doherty* [1912] 1 I. R. 349.
Reversed on points 1 and 2 and affirmed on point 3. [1914] **A. C. 823**

—— *Edinburgh Life Assurance Co.* v. *Lord Advocate* [1910] A. C. 143.
Discussed. SUGDEN *v.* LEEDS CORPORATION - - [1914] **A. C. 483**

—— *Eyre* v. *New Forest Highway Board* (1892) 56 J. P. 517. Doubted. CABABÉ *v.* WALTON-ON-THAMES URBAN COUNCIL [1914] **A. C. 102**

—— *Falkland Islands Co.* v. *Reg.* (1862) 1 Moo. P. C. (N.S.) 299.
Referred to. ARNOLD *v.* KING-EMPEROR - - [1914] **A. C. 644**

CASES—*continued.*

—— *Fenton* v. *Thorley & Co.* [1903] A. C. 443, at p. 448.
Dictum of Lord Macnaghten in, explained. TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY - - - [1914] **A. C. 667**

—— *Fleeming* v. *Howden* (1868) L. R. 1 H. L. Sc. 372.
Dictum of Lord Westbury at p. 383 in, considered. BANK OF SCOTLAND *v.* MACLEOD - - - [1914] **A. C. 311**

—— *Flood* v. *Irish Provident Assurance Co.* (1910) 46 Ir. L. T. 421; [1912] 2 Ch. 597, n.
Distinguished. SINCLAIR *v.* BROUGHAM [1914] **A. C. 398**

—— *Great Central Ry. Co.* v. *Midland Ry. Co.* [1912] 1 Ch. 206.
Affirmed - - [1914] **A. C. 1**

—— *Guardian Permanent Benefit Building Society, In re* (1882) 23 Ch. D. 440.
Considered and distinguished. SINCLAIR *v.* BROUGHAM - [1914] **A. C. 398**

—— *Hallett's Estate, In re* (1880) 13 Ch. D. 696
Principle of, applied. SINCLAIR *v.* BROUGHAM - [1914] **A. C. 398**

—— *Hilcoat* v. *Archbishops of Canterbury and York* (1850) 10 C. B. 327.
Explained. CORRIE *v.* MACDERMOTT [1914] **A. C. 1056**

—— *Hubbard, Ex parte* (1886) 17 Q. B. D. 690
Distinguished. DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY [1914] **A. C. 823**

—— *Inland Revenue Commissioners* v. *Fitzwilliam (Earl)* [1913] 2 K. B. 593.
Affirmed *sub nom.* EARL FITZWILLIAM *v.* INLAND REVENUE COMMISSIONERS [1914] **A. C. 753**

—— *Kerr* v. *William Baird & Co.*, 1911 S. C. 701.
Distinguished. SMITH *v.* FIFE COAL COMPANY - - [1914] **A. C. 723**

—— *Kirkwood* v. *Gadd* - [1910] A. C. 422
Dicta of Lord Atkinson and Lord Mersey in, explained and distinguished HADSLEY *v.* DAYER-SMITH [1914] **A. C. 979**

—— *Levine* v. *Serling* - [1914] A. C. 659, 664
See LEVINE *v.* SERLING (No. 2) [1914] **A. C. 665**

—— *Linlithgow (Marquess of)* v. *North British Ry. Co.*, 1912 S. C. 1327.
Reversed on one point but affirmed on other grounds - [1914] **A. C. 820**

—— *Lloyd* v. *Powell Duffryn Steam Coal Co.* [1913] 2 K. B. 130.
Reversed - - [1914] **A. C. 733**

CASES—*continued.*

—— *London County Council* v. *Attorney-General* [1901] A. C. 26.
Discussed. SUGDEN *v.* LEEDS CORPORATION - - [1914] A. C. 483

—— *Lucas and Chesterfield Gas and Water Board, In re* [1909] 1 K. B. 16.
Approved and applied. CEDARS RAPIDS MANUFACTURING AND POWER COMPANY *v.* LACOSTE
[1914] A. C. 569

—— *Lumsden* v. *Inland Revenue Commissioners* [1913] 3 K. B. 809.
Affirmed - - [1914] A. C. 877

—— *Makin* v. *Attorney-General for New South Wales* [1894] A. C. 57.
Explained. IBRAHIM *v.* REX
[1914] A. C. 599

—— *Manks* v. *Whiteley* - [1912] 1 Ch. 735
Reversed *sub nom.* WHITELEY *v.* DELANEY - - [1914] A. C. 132

—— *Markley* v. *Tolworth Joint Isolation Hospital District Board* [1900] 2 Q. B. 454.
Disapproved. BRITISH ELECTRIC RAILWAY COMPANY *v.* GENTILE
[1914] A. C. 1034

—— *Metropolitan Water Board* v. *Avery* [1914] 1 K. B. 221.
Affirmed - - [1914] A. C. 118

—— *Midland Ry. Co.* v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841.
Distinguished. GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY - - [1914] A. C. 1

—— *Murray* v. *Denholm & Co.*, 1911 S. C. 1087
Overruled. TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY - - [1914] A. C. 667

—— *Nisbet* v. *Rayne* - - [1910] 2 K. B. 689
Approved. TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY - - [1914] A. C. 667

—— *North Western Salt Co.* v. *Electrolytic Alkali Co.* [1913] 3 K. B. 422.
Reversed - - [1914] A. C. 461

—— *Phœnix Life Assurance Co., In re* (1862) 2 J. & H. 441.
Distinguished. SINCLAIR *v.* BROUGHAM
[1914] A. C. 398

—— *Price* v. *Attorney-General* [1912] 1 Ch. 667
Orders of the Court of Appeal and of Swinfen Eady J. discharged, and a new scheme substituted by consent.
[1914] A. C. 20

—— *Reg.* v. *Joykissen Mookerjee* (1862) 1 Moo. P. C. (N. S.) 272.
Referred to. ARNOLD *v.* KING-EMPEROR - - [1914] A. C. 644

CASES—*continued.*

—— *Reg.* v. *Thomas* - (1857) 7 E. & B. 399
Disapproved. CABABÉ *v.* WALTON-ON-THAMES URBAN COUNCIL
[1914] A. C. 102

—— *Rex* v. *Ireland* - - [1910] 1 K. B. 654
Overruled. FELSTEAD *v.* REX
[1914] A. C. 534

—— *Rex* v. *Machardy* - [1911] 2 K. B. 1144
Followed, but the reasoning of the decision disapproved. FELSTEAD *v.* REX - - - [1914] A. C. 534

—— *Rex* v. *Norton* - - [1910] 2 K. B. 496
Considered. REX *v.* CHRISTIE
[1914] A. C. 545

—— *Rodocanachi* v. *Milburn* (1886) 18 Q. B. D. 67.
Approved. WILLIAMS BROTHERS *v.* ED. T. AGIUS, LIMITED
[1914] A. C. 510

—— *Shearer* v. *Shields* - - 1913 S. C. 1012
Affirmed - - - [1914] A. C. 808

—— *Smith* v. *Fife Coal Co.* - 1913 S. C. 662
Reversed - - - [1914] A. C. 723

—— *Stebbing* v. *Metropolitan Board of Works* (1870) L. R. 6 Q. B. 37.
Explained. CORRIE *v.* MACDERMOTT
[1914] A. C. 1056

—— *Tottenham Urban District Council* v. *Rowley* [1912] 2 Ch. 633.
Affirmed *sub nom.* ROWLEY *v.* TOTTENHAM URBAN DISTRICT COUNCIL
[1914] A. C. 95

—— *Toulmin* v. *Steere* - (1817) 3 Mer. 210
Considered. WHITELEY *v.* DELANEY
[1914] A. C. 132

—— *Turner* v. *Evans* - (1853) 2 E. & B. 512
Followed. HADSLEY *v.* DAYER-SMITH
[1914] A. C. 979

—— *Turner* v. *Walsh* - (1881) 6 App. Cas. 636
Referred to. FOLKESTONE CORPORATION *v.* BROCKMAN - [1914] A. C. 338

—— *Watkins, In re; Maybery* v. *Lightfoot* [1913] 1 Ch. 376.
Reversed *sub nom.* LIGHTFOOT *v.* MAYBERY - - [1914] A. C. 782

—— *Watkins* v. *Guest, Keen & Nettlefolds* (1912) 5 B. W. C. C. 307.
Considered. PLUMB *v.* COBDEN FLOUR MILLS COMPANY, LIMITED
[1914] A. C. 62

—— *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A. C. 301.
Distinguished. WILLIAMS BROTHERS *v.* ED. T. AGIUS, LIMITED
[1914] A. C. 510

—— *Western* v. *Kensington Assessment Committee* [1908] 1 K. B. 811.
Approved. ST. MARYLEBONE ASSESSMENT COMMITTEE *v.* CONSOLIDATED LONDON PROPERTIES, LIMITED
[1914] A. C. 870

CASES—*continued.*
—— *Will* v. *United Lankat Plantations Co.* [1912]2 Ch. 571.
Affirmed - - [1914] **A. C. 11**

CEYLON—Laws of.
See PRIVY COUNCIL APPEALS. 26.

CHARGE—Mortgage.
See under MORTGAGE.

CHARITY—*National School—Conveyance of Site under the School Sites Act*, 1841 (4 & 5 *Vict. c.* 38)—*Trust for the Education of the Poor in the Principles of the Established Church—Failure of Special Trust—Scheme for the Regulation of the Charity.*
Orders of the Court of Appeal and of Swinfen Eady J. [1912] 1 Ch. 667 discharged, and a new scheme substituted by consent. PRICE *v.* ATTORNEY-GENERAL - - - **H. L. (E.) 20**

CHINA AND COREA ORDER IN COUNCIL, 1904 - - - - - - **599**
See PRIVY COUNCIL APPEALS. 28.

CLOG—Mortgage—Clog on equity of redemption—Collateral advantage—Whether enforceable after redemption - - **25**
See MORTGAGE. 1.

COLLATERAL ADVANTAGE—Mortgage—Clog on equity of redemption — Whether enforceable after redemption - - **25**
See MORTGAGE. 1.

COLUMBIA (BRITISH)—Laws of.
See PRIVY COUNCIL APPEALS. 20, 21.

COMPANY — *Preference Shares — Ordinary Shares — Distribution of Profits — Rights of Shareholders inter se.*
A company which had power under its articles to issue new shares upon such terms, including preference, as the company in general meeting might direct passed a resolution that the capital of the company be increased by the issue of certain new shares to be called preference shares and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares, and that such preference shares should rank, both as regards capital and dividend, in priority to the other shares. Preference shares were issued in accordance with this resolution. The articles further provided that, subject to any priorities that might be given upon the issue of any new shares, the profits of the company available for distribution should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively :—
Held, that in the distribution of profits holders of the preference shares were not entitled to anything more than a 10 per cent. dividend.
Decision of the Court of Appeal [1912] 2 Ch. 571 affirmed. WILL *v.* UNITED LANKAT PLANTATIONS COMPANY, LIMITED **H. L. (E.) 11**

COMPANY—*continued.*
—— Income tax—Company formed to realize assets — Profits of company — Appeal from Australia - - - - **1001**
See PRIVY COUNCIL APPEALS. 7.

—— Mortgage or charge—Registration—Bill of sale—Debentures—Trust deed—Appeal—Competency—Winding-up in Ireland—Appeal by liquidator without leave of Court - - - - - **823**
See PLEDGE.

—— Revenue—Duty on dividend—Appeal from Western Australia - - - **231**
See PRIVY COUNCIL APPEALS. 9.

—— Tramway company.
See under TRAMWAY.

—— Water company.
See under WATER.

—— Winding-up — Bankruptcy — Preferential claim—Obligation to assign debenture in security for debt—Assignation not completed at date of liquidation - **311**
See SCOTTISH LAW.

COMPENSATION — Expropriation of lands — Water power — Value to owners — Statutory powers—Appeal from Quebec
See PRIVY COUNCIL APPEALS. 25. **569**

—— Grant of land to society—Limited purposes—Resumption—"Value of the land"—Appeal from Australia - - **1056**
See PRIVY COUNCIL APPEALS. 2.

—— Land resumed by Government—Compensation—Prospective profits of business **1083**
See PRIVY COUNCIL APPEALS. 6.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPULSORY POWERS.
See under POWERS.

COMPULSORY PURCHASE—Tramway company—Appeal from Jamaica - - **986**
See PRIVY COUNCIL APPEALS. 29.

CONSTABLE.
See under POLICE.

CONSTRUCTIVE DELIVERY - - **823**
See PLEDGE.

CONTRACT—Restraint of trade—Trade combination—Public policy — Illegality — Surrounding circumstances — Evidence — Pleading - - - - - **461**
See RESTRAINT OF TRADE. 1.

—— Sale of goods — Breach — Non-delivery — Measure of damages - - **510**
See SALE OF GOODS.

CORPORATION — Leeds Corporation — Income tax - - - - - - - **483**
See REVENUE. 1.

COSTS — In forma pauperis, Appeal — Costs—Taxation—Costs of petition for special leave—Appeal from Canada - 665
See PRIVY COUNCIL APPEALS. 12.

COVENANT — Lease—Licensed premises—Tied house—"Market price" of beer - 71
See LEASE.

—— Restraint of trade.
See under RESTRAINT OF TRADE.

CRIMINAL LAW — *Appeal—Special Verdict of Guilty but Insane—Right of Appeal—Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38), *s.* 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

A special verdict given under the Trial of Lunatics Act, 1883, is one and indivisible and is a verdict of acquittal. Therefore an accused person who by the special verdict is found guilty of the act charged but insane at the time is not a convicted person within s. 3 of the Criminal Appeal Act 1907, and cannot appeal from that part of the verdict which finds that he was insane at the time of doing the act.

Rex v. *Ireland* [1910] 1 K. B. 654 overruled.

Rex v. *Machardy* [1911] 2 K. B. 1144 followed, but the reasoning of the decision disapproved.

Decision of the Court of Criminal Appeal affirmed on other grounds. FELSTEAD *v.* REX H. L. (E.) 534

2. —— *Evidence—Admissibility—Statement made in Presence of Accused.*

There is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement; but where the accused denies the truth of the statement the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value and might unfairly prejudice the jury against the accused, it ought not to be admitted.

The respondent was convicted of an indecent assault upon a little boy. At the trial the boy's mother stated in evidence that, as she and her son came up to the respondent shortly after the act complained of, the little boy said in the respondent's hearing "That is the man" and described what the respondent did to him, and that the respondent replied "I am innocent." The Court of Criminal Appeal quashed the conviction upon the authority of *Rex* v. *Norton* [1910] 2 K. B. 496, on the ground that evidence of a statement made in the presence of the accused was not admissible against him unless he acknowledged the truth of the statement:—

Held, that the evidence was admissible in law in reference to the demeanour of the respondent, and by Lord Atkinson, with the concurrence of Lord Parker, (Viscount Haldane L.C., Lord Dunedin, Lord Moulton, and Lord Reading dissenting) as part of the act of identification.

Decision of the Court of Criminal Appeal reversed on this point, but the order quashing the conviction affirmed on the ground of misdirection by the presiding judge on the question

CRIMINAL LAW—*continued.*

of the corroboration required by s. 30 of the Children Act, 1908.

Rex v. *Norton* [1910] 2 K. B. 496 considered.

REX *v.* CHRISTIE - - - H. L. (E.) 545

—— Embezzlement — Seychelles Penal Code (Order 10 of 1904), s. 216—Nature of offence—Criminal intent — Conviction set aside . - - - - - 221
See PRIVY COUNCIL APPEALS. 31.

—— Judicial Committee, Practice of the — Criminal proceedings — Appeal in criminal matter - - - - 644
See PRIVY COUNCIL APPEALS. 10.

CROWN—Trover and detinue—Jus tertii—Timber rights in Crown mining lands—Independent contractors — Defendants receiving benefit of trespass—Ratification—Appeal from Canada - - 197
See PRIVY COUNCIL APPEALS. 19.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGES — Sale of goods — Breach — Non-delivery — Contract — Measure of damages - - - - - 510
See SALE OF GOODS.

DANGEROUS METHOD — of doing work — Accident—Workmen's compensation
See EMPLOYER AND WORKMAN. 2. 62

DEBENTURES—Company,
See under COMPANY.

DEDICATION—Highway.
See under HIGHWAY.

DELIVERY—Constructive delivery - - 823
See PLEDGE.

DEPENDANT — Workmen's compensation — Posthumous illegitimate child — Evidence - - - - - - 733
See EMPLOYER AND WORKMAN. 4.

DETINUE—Timber rights in Crown mining lands—Appeal from Canada - 197
See PRIVY COUNCIL APPEALS. 19.

DEVISE—Will—Construction.
See under WILL.

DIVIDEND — Company — Revenue — Duty on dividend — Appeal from Western Australia - - - - - - 231
See PRIVY COUNCIL APPEALS. 9.

DUTY—Inland Revenue.
See under REVENUE.

EMBEZZLEMENT—Nature of offence—Criminal intent—Conviction set aside — Appeal from Seychelles - - - - 221
See PRIVY COUNCIL APPEALS. 31.

EMPLOYER AND WORKMAN—*Compensation — Accident — Premeditated Assault — "Arising*

EMPLOYER AND WORKMAN—*continued.*

out of and in course of the employment"—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An assistant master at an industrial school, whilst engaged in the performance of his duties, was assaulted by two of the pupils in pursuance of a preconcerted plan of attack and killed. A dependant of the deceased claimed compensation from the managers of the school. The county court judge found that some of the boys were unruly and badly disposed and that the deceased met his death by accident arising out of and in the course of his employment:—

Held (by Viscount Haldane L.C., Earl Loreburn, Lord Shaw of Dunfermline, and Lord Reading; Lord Dunedin, Lord Atkinson, and Lord Parker of Waddington dissenting)—(1.) that the death was caused by accident; (2.) that there was evidence to support the finding of the arbitrator that the accident arose out of the employment.

Dictum of Lord Macnaghten in *Fenton* v. *Thorley & Co.* [1903] A. C. 443, at p. 448, explained.

Anderson v. *Balfour* [1910] 2 I. R. 497 and *Nisbet* v. *Rayne* [1910] 2 K. B. 689 approved.

Murray v. *Denholm & Co.*, 1911 S. C. 1087, overruled.

Decision of the Court of Appeal in Ireland affirmed. TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY
H. L. (I.) 667

2. —— *Compensation — Accident arising out of Employment—Dangerous Method of doing Work — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The appellant was employed with two others in a room in the respondents' mill to stack bundles of sacks. The bundles were always stacked by hand. After the men had raised the bundles as high as they could by hand the appellant resolved to utilize for this purpose a revolving shaft which ran along the room near the ceiling but was not used in connection with any machinery in that room. A rope was thrown over the shaft and one end was made fast to a bundle which was then hauled by means of the shaft to the top of the stack. The appellant, who was standing on the stack, while endeavouring to extricate a bundle which had been hauled too high and had stuck between the shaft and the ceiling, got his arm entangled in the rope and was carried round the shaft and injured:—

Held, that there was no evidence to support a finding by the county court judge that the accident arose out of the workman's employment within the Workmen's Compensation Act.

Watkins v. *Guest, Keen & Nettlefolds* (1912) 5 B. W. C. C. 307, considered. PLUMB *v.* COBDEN FLOUR MILLS COMPANY, LIMITED
H. L. (E.) 62

3. —— *Compensation — Mining — Accident arising out of and in the Course of Employment—Breach of Mining Regulations—Miner doing Shot-firer's Work—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed

EMPLOYER AND WORKMAN—*continued.*

shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the cable, first, with the charge and, thereafter, with the firing apparatus, after seeing that all persons in the vicinity had taken shelter.

A duly appointed shot-firer, in breach of these regulations, handed the cable to a miner for the purpose of having it connected with the charge, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, connected the cable with the firing apparatus. He then fired the shot, and the miner, who had connected the cable with the charge and had not had time to retire to a place of safety, was injured by the explosion:—

Held, that the essential cause of the accident was not the unauthorized assumption by the miner of the shot-firer's duty, but the premature firing by the shot-firer, and that there was evidence to support the finding of the arbitrator that the injury to the miner arose out of and in the course of his employment.

Kerr v. *William Baird & Co.*, 1911 S. C. 701, distinguished.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 662, reversed. SMITH *v.* FIFE COAL COMPANY, LIMITED
H. L. (Sc.) 723

4. —— *Compensation — Posthumous Illegitimate Child—Dependant — Evidence — Admissibility—Statements of Deceased—Acknowledgment of Paternity—Promise to marry—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

Upon a claim for compensation under the Workmen's Compensation Act, 1906, by a posthumous illegitimate child as a dependant of its putative father, who was killed by accident arising out of and in the course of his employment with the respondents, evidence of statements made by the deceased to the effect that he acknowledged the paternity of the child and that he intended to marry the mother before the child was born is admissible both on the issue of paternity and on the issue of dependency, as evidence of the state of mind of the deceased in relation to the child.

Semble per Lord Shaw of Dunfermline: The fact of dependency, whether in the case of legitimate or illegitimate children, and whether born or to be born, does not necessarily rest upon any promise of support by the father.

Decision of the Court of Appeal [1913] 2 K. B. 130 reversed. LLOYD *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED
H. L. (E.) 733

EQUITY OF REDEMPTION—Mortgage.
See under MORTGAGE.

ESTATE DUTY.
See under REVENUE.

EVIDENCE — Admissibility — Criminal law — Statement made in presence of accused
See CRIMINAL LAW. 2. **545**

—— Workmen's compensation — Posthumous illegitimate child—Dependant - **733**
See EMPLOYER AND WORKMAN. 4.

FALSE IMPRISONMENT—*Scottish Procedure—Issue—Arrest by Constable without Warrant—Reasonable Grounds of Suspicion—Malice and Want of Probable Cause—Privilege—Glasgow Police Act*, 1866 (29 & 30 *Vict. c. cclxxiii.*), *s.* 88.

The Glasgow Police Act, 1866, s. 88, empowers constables within the city to take into custody without any other authority than the Act any person "who is either accused or reasonably suspected of having committed" a penal offence.

In an action of damages for wrongful apprehension against two Glasgow constables who had arrested the pursuer on suspicion without a warrant :—

Held, that malice in fact need not be proved by the pursuer; and an issue whether the defenders "wrongfully and illegally and without reasonable grounds of suspicion" apprehended the pursuer approved.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 1012, affirmed. SHEARER *v.* SHIELDS - - **H. L. (Sc.) 808**

FAMILIES COMPENSATION ACT, 1911, ss. 3, 5—Appeal from British Columbia - **1034**
See PRIVY COUNCIL APPEALS. 20.

FATAL ACCIDENTS ACT, 1846, ss. 1, 3—Appeal from British Columbia - **1034**
See PRIVY COUNCIL APPEALS. 20.

FIDUCIARY OBLIGATION—Breach of—Solicitor and client—Claim for indemnity—Misrepresentation—Improper advice—Fraud—Negligence - - - **932**
See SOLICITOR.

FINANCE ACTS.
See under REVENUE.

FISHING RIGHTS — Power to grant — Legislative authority of province—Railway belt — Tidal waters — Navigable non-tidal waters — Territorial waters — Appeal from Canada - - - **153**
See PRIVY COUNCIL APPEALS. 13.

FOOTPATH — Highway—Dedication — Building estate—Deposited plans—Proposed road and footpath — Intention — User by public—Extent of dedication - **95**
See HIGHWAY. 1.

FOREIGN JURISDICTION—China, Jurisdiction in—Afghan enlisted in Indian regiment—British subject—Appeal from Hong Kong - - - - - - **599**
See PRIVY COUNCIL APPEALS. 28.

FOREIGN JURISDICTION ACT, 1890, ss. 1, 4, 6, 9 - - - - - - **599**
See PRIVY COUNCIL APPEALS. 28.

FRAUD—Solicitor and client—Claim for indemnity—Misrepresentation—Improper advice — Negligence — Breach of fiduciary obligation - - - - **932**
See SOLICITOR.

GLASGOW POLICE ACT, 1866, s. 88 - **808**
See FALSE IMPRISONMENT.

GOLD COAST COLONY—Laws of - - **626**
See PRIVY COUNCIL APPEALS. 27.

GOODS—Sale of.
See under SALE OF GOODS.

HALIFAX CITY CHARTER—Municipal taxation—Appeal from Canada - - **992**
See PRIVY COUNCIL APPEALS. 18.

HIGHWAY — *Dedication — Building Estate — Deposited Plan—Proposed Road and Footpath—Intention—User by Public—Extent of Dedication—Adjoining Owner—Right of Access to Highway.*

The defendant in the action (now appellant) laid out and developed his property as a building estate in accordance with a plan approved by the plaintiffs, the local authority. The plan shewed a proposed road bounded on the north by the boundary fence of a park belonging to the plaintiffs, and having, on either side of it, dotted lines indicating intended footpaths forming part of the road, which, in accordance with the by-laws, was of the total width of forty feet. The defendant built houses on the southern side of the road overlooking the plaintiffs' boundary fence and made up and metalled the road for one half of its width next to the houses. The further or northern half of the road next to the plaintiffs' fence was left unmetalled and untouched. The evidence shewed that for some three years before action brought the road, which connected two public highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists, and carts, the metalled part being used in preference to the unmetalled part.

The plaintiffs had recently opened a gate in their boundary fence and were carting building materials across the unmetalled portion of the road and the part intended to be appropriated for a footpath. The defendant objected on the ground that the unmetalled portion was not subject to any public right of way, and that, even if it were, the plaintiffs were not entitled to take their carts over the part appropriated solely for the purposes of a footpath.

Joyce J. found as a fact that there had been a dedication of the whole width of the road as a highway and held that the plaintiffs as adjoining owners were entitled at reasonable times and to a reasonable extent to cross on foot or with vehicles the portion of the highway appropriated as a footpath, and the Court of Appeal affirmed his decision :—

Held, as regards dedication, that there was no sufficient ground for disturbing the decisions of the Courts below upon a question of fact, and that the plaintiffs as adjoining owners were entitled to the access which they claimed.

Order of the Court of Appeal [1912] 2 Ch. 633 affirmed. ROWLEY *v.* TOTTENHAM URBAN DISTRICT COUNCIL - - **H. L. (E.) 95**

2. —— *Repair—Way becoming a Highway after* 1835—*Absence of Intentional Dedication by Owner—Whether repairable by Inhabitants at large—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23.

Sect. 23 of the Highway Act, 1835, which

HIGHWAY—*continued.*
limits the liability of a parish to repair new highways, applies to highways which have become such as the result of dedication presumed from public user.

A road is "made by and at the expense of an individual or private person, body politic or corporate," within the meaning of the section, if the owner of the soil suffers it to be used as a road long enough for it to become a road in fact, and if any expense there may be has to be at his charge.

Per Earl Loreburn: The section is not confined to a case in which the same person makes the road and spends the money.

At some date between 1835 and 1864 a lane became a public highway, but there was no evidence to shew at what precise date, or how, when, or at whose expense the lane was originally made. The lane was apparently in existence prior to an inclosure award of 1804, made under an Act which provided that all roads not set out in the award should be extinguished, and was included in the lands allotted by the award, but was not set out as a road:—

Held, that it was not a highway repairable by the inhabitants at large.

Per Lord Dunedin: *Reg.* v. *Thomas* (1857) 7 E. & B. 399 disapproved, and *Eyre* v. *New Forest Highway Board* (1892) 56 J. P. 517 doubted.

Decision of the Court of Appeal [1913] 1 K. B. 481 affirmed. CABABÉ *v.* WALTON-ON-THAMES URBAN DISTRICT COUNCIL
H. L. (E.) 102

—— Private street works—Highway repairable by inhabitants at large—Dedication of private carriage road on highway for foot passengers—Long user—Presumption in favour of dedication - - 338
See STREET.

HONG KONG—Laws of.
See PRIVY COUNCIL APPEALS. 28.

HOUSE AGENT—Covenant in restraint of trade—Construction — Breach—Business of house agent—"Carrying on business"
See RESTRAINT OF TRADE. 2. 979

ILLEGITIMACY — Workmen's compensation—Posthumous illegitimate child—Dependant—Evidence—Admissibility - 733
See EMPLOYER AND WORKMAN. 4.

IMPRISONMENT—False imprisonment.
See under FALSE IMPRISONMENT.

INCOME TAX.
See under REVENUE.

INCREMENT VALUE DUTY—Occasional site value—Sale of fee simple—Mode of calculation - - - - - 877
See REVENUE. 2.

INDEMNITY—Claim for—Solicitor and client—Misrepresentation—Improper advice—Fraud—Negligence—Breach of fiduciary obligation—Pleading—Cause of action - - - - - - 932
See SOLICITOR.

INDIA—Jurisdiction in China—Afghan enlisted in Indian regiment—British subject
See PRIVY COUNCIL APPEALS. 28. 599

INFANT—Procedure in Quebec—Action against minor—Nullity of proceedings - 659
See PRIVY COUNCIL APPEALS. 24.

IN FORMA PAUPERIS — Appeal—Costs of petition for special leave — Costs — Taxation—Appeal from Canada - 665
See PRIVY COUNCIL APPEALS. 12.

INLAND REVENUE.
See under REVENUE.

INSANITY.
See under LUNACY.

INSURANCE (LIFE)—Re-insurance—Construction of policy—Statements basis of contract—Settlement of claim by re-insured — Liability of re-insurers — Appeal from Australia - - - 634
See PRIVY COUNCIL APPEALS. 3.

—— Waiver of statutory provisions—Public policy—Surrender value—Appeal from New Zealand - - - - 587
See PRIVY COUNCIL APPEALS. 30.

INTESTACY — Will — Construction — Realty—Devise—"Nearest male heir"—"Nearest and eldest male relative"—Vesting—Postponement - - - - 782
See WILL.

IRISH LAW—Pledge—Constructive delivery—Delivery order—Company — Mortgage or charge—Registration — Winding-up in Ireland—Appeal by liquidator without leave of Court - - - 823
See PLEDGE.

JAMAICA—Laws of.
See PRIVY COUNCIL APPEALS. 29.

JUDICIAL COMMITTEE — Practice of the—Criminal proceedings — Appeal in criminal matter - - - - 644
See PRIVY COUNCIL APPEALS. 10.

JURISDICTION—Foreign.
See under FOREIGN JURISDICTION.

JUS TERTII—Timber rights in Crown mining lands—Appeal from Canada - 197
See PRIVY COUNCIL APPEALS. 19.

LAND—Compensation—Expropriation of lands—Water power—Value to owners—Statutory powers—Appeal from Quebec
569
See PRIVY COUNCIL APPEALS. 25.

—— Land compulsorily taken for public works—Costs of arbitration—Appeal from New South Wales - - - 581
See PRIVY COUNCIL APPEALS. 5.

LEASE—*Covenant—Construction—Licensed Premises—Tied House—"Market Price" of Beer.*

A London brewing company demised a public-house to a publican, who covenanted to

LEASE—*continued.*
deal exclusively with the lessors for beer, provided they should be willing to supply the same to him at the fair market price. It appeared that the great bulk of the London brewers' trade was done with tied houses; that the London brewers supplied beer at standard prices; that in the case of tied houses discount was allowed at certain recognized rates; but that in the case of free tenants the amount of discount was the subject of special bargain, and that free tenants often obtained a higher rate of discount:—

Held, that the term "market" was to be construed with reference to the surrounding circumstances, and that upon the true construction of the proviso the lessee was to be charged the fair market price as applying to tenants of tied houses and was not entitled to discount beyond the recognized rates.

Decision of the Court of Appeal reversed on this point. CHARRINGTON & CO., LIMITED *v.* WOODER - - - - - - **H. L. (E.) 71**

—— Reversion duty—Determination of lease—Value of benefit accruing to lessor—Total value of land—Licensed premises
See REVENUE. 3. **753**

LEEDS—Income tax—Loans charged on undertakings of corporation - - - **483**
See REVENUE. 1.

LEEDS CORPORATION (GENERAL POWERS) ACT, 1901, ss. 37, 38, 39, 40, 46, 47
See REVENUE. 1. **483**

LETTERS PATENT—Creating province—Boundary of States—State of South Australia—State of Victoria—Degree of longitude stated as boundary—Implied authority of Executives to locate - - **283**
See PRIVY COUNCIL APPEALS. 1.

LICENSED PREMISES — Lease — Covenant—Construction — Tied house — "Market price" of beer - - - - - **71**
See LEASE.

—— Reversion duty—Determination of lease—Value of benefit accruing to lessor—Total value of land - - - **753**
See REVENUE. 3.

——Water—Supply—Domestic purposes—Trade purposes — Public-house — Catering business - - - - - **118**
See WATER. 1.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIQUIDATOR—Company.
See under COMPANY.

LONDON — *Rates — Poor Rate — Valuation — Houses and Buildings let out in Separate Tenements—Rateable Value—Deductions from Gross Value—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 52, *Sched. III.*

Sect. 52 of the Valuation (Metropolis) Act, 1869, provides that in calculating the rateable value of hereditaments for the purposes of the Act the rate of deductions to be made from the gross value shall not exceed the amounts in the

LONDON—*continued.*
Third Schedule to the Act. The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list are to be divided and the maximum rate of deductions to be made in respect thereof, contains in a footnote a provision that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements:—

Held, that the provision in the footnote applied to houses or buildings let out in separate tenements, although such houses or buildings were not separately valued or inserted in the valuation list.

A block of buildings in London was divided into a series of self-contained flats, each having its own front door opening on to a common staircase. Each flat was in the separate occupation of a tenant holding under a lease or an agreement. Each tenant was entered in the valuation list as the rateable occupier and was rated in respect of his occupation. The owner of the block of buildings was not entered in the valuation list as occupier either of the block or of the flats, and the block was not separately valued in the valuation list. The flats were entered in the valuation list and valued as separate rateable hereditaments:—

Held, that in calculating the rateable value of the flats the block was a house or building let out in separate tenements within the meaning of the footnote to the Third Schedule.

Western v. *Kensington Assessment Committee* [1908] 1 K. B. 811 approved.

Decision of the Court of Appeal [1913] 3 K. B. 230 affirmed. ST. MARYLEBONE ASSESSMENT COMMITTEE *v.* CONSOLIDATED LONDON PROPERTIES, LIMITED - - - **H. L. (E.) 870**

—— Water.
See under WATER.

LUNACY—Criminal appeal—Special verdict of guilty but insane—Right of appeal **534**
See CRIMINAL LAW. 1.

MALICE—False imprisonment — Scottish procedure — Issue — Arrest by constable without warrant - - - - **808**
See FALSE IMPRISONMENT.

"MARKET PRICE" — of beer—Lease—Covenant—Construction—Licensed premises—Tied house - - - - **71**
See LEASE.

MERGER—Mortgages—Priority—Title based on deeds framed under a common mistake—Yorkshire Registries Act, 1884 - **132**
See MORTGAGE. 2.

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907, ss. 8, 25 - - - **118**
See WATER. 1.

MINE — *Compulsory Powers—Canal—Right of Support—Mines and Minerals—Notice to stop*

MINE—*continued.*
working—Union Canal Act, 1817 (57 *Geo.* 3, *c. lvi.*), *s.* 113.

In an action by a mineral owner and his tenants for compensation in respect of a seam of oil shale which they alleged they had been stopped from working by the proprietors of the canal, under the powers of a private Act of 1817, to ensure the safety of the canal :—

Held, upon the construction of the correspondence between the parties and of the private Act, that the defenders had not stopped the working of the seam.

Decision of the First Division of the Court of Session, 1912 S. C. 1327, reversed on this point but affirmed on other grounds. MARQUESS OF LINLITHGOW *v.* NORTH BRITISH RAILWAY COMPANY - - - - - **H. L. Sc. 820**

—— Support, Right of—Compensation for lands taken—Minerals—Canadian railways—Appeal from Ontario - - - **1043**
See PRIVY COUNCIL APPEALS. 22.

—— Timber rights in Crown mining lands—Crown Timber Act, 1897, ss. 1, 2—Mines Act, 1897, ss. 39, 40—Appeal from Canada - - - - **197**
See PRIVY COUNCIL APPEALS. 19.

—— Workmen's compensation — Breach of mining regulations—Miner doing shot-firer's work - - - - - **723**
See EMPLOYER AND WORKMAN. 3.

MINERALS.
See under MINE.

MISREPRESENTATION—Solicitor and client—Claim for indemnity—Improper advice — Fraud — Negligence — Breach of fiduciary obligation - - - **932**
See SOLICITOR.

MISTAKE — Mortgages — Priority — Merger — Title based on deeds framed under a common mistake—Yorkshire Registries Act, 1884 - - - - - **132**
See MORTGAGE. 2.

MONEY HAD AND RECEIVED — Building society—Borrowing—Banking business — Ultra vires — Winding-up — Distribution of assets—Priorities - - **398**
See BUILDING SOCIETY.

MORTGAGE—*Clog on Equity of Redemption—Collateral Advantage — Whether enforceable after Redemption.*

There is now no rule in equity that a mortgagee cannot stipulate in the mortgage deed for a collateral advantage to endure beyond redemption, provided that such collateral advantage is not either (1.) unfair and unconscionable, or (2.) in the nature of a penalty clogging the equity of redemption, or (3.) inconsistent with or repugnant to the contractual or equitable right to redeem.

The dicta of Lord Lindley on this point in *Bradley* v. *Carritt* [1903] A. C. 253 preferred to the dicta of Lord Macnaghten and Lord Davey.

Per Viscount Haldane L.C.; *Semble* the equitable doctrine against clogging applies to a floating charge as much as to any other mortgage security.

By an agreement dated August 24, 1910, a firm of woolbrokers agreed to lend to a company carrying on the business of meat preservers a sum of 10,000*l.* at 6 per cent. If the interest was punctually paid the loan was not to be called in until September 30, 1915, but the company might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheepskins sold by the company to any other person. The loan having been paid off by the company in January, 1913, in accordance with the agreement, the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan :—

Held, that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan ; that it was not a clog on the equity of redemption or repugnant to the right to redeem ; and that the lenders were entitled to an injunction restraining the company from selling sheepskins to any person other than the lenders in breach of the agreement.

Order of the Court of Appeal reversed. G. AND C. KREGLINGER *v.* NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LIMITED **H. L. (E.) 25**

2. —— *Priority — Merger — Reconveyance and New Mortgage without Notice of Intermediate Charge—Concealment by Mortgagor of Intermediate Charge—Title based on Deeds framed under a Common Mistake—Yorkshire Registries Act*, 1884 (47 *&* 48 *Vict. c.* 54), *s.* 14.

A freehold farm in Yorkshire was mortgaged, first, to A. to secure 300*l.*, and, secondly, to the plaintiff. Both mortgages were duly registered under the Yorkshire Registries Acts. The mortgagor, who was being pressed by A. for payment, offered to sell the farm to his daughter L. for 450*l.* L. accepted the offer conditionally on her being able to find some one to provide 300*l.* to pay off A. She consulted W., a solicitor, and told him she was buying the property for 450*l.* and wanted some one to provide the money due to A., and instructed him to carry out the transaction. W. introduced F., who agreed to advance 300*l.* on a first mortgage of the farm, and, on receipt of the money from F., paid off A. and obtained from him the title deeds on F.'s behalf. W. acted for all the parties except A. Neither W. nor any of the parties except the mortgagor had any knowledge of the plaintiff's mortgage, and the mortgagor did not disclose it. W. then prepared three deeds, which were duly executed and registered—1. a reconveyance by A. to the mortgagor ; 2. a conveyance by the mortgagor to L. ; 3. a mortgage by L. to F. An interval of

MORTGAGE—*continued.*
three weeks elapsed between the payment off of A. and the execution of the deeds, the first two of which bore the same date, the third being dated the following day. The plaintiff, in an action against F., L., and the mortgagor, claimed that by virtue of the reconveyance to the mortgagor his mortgage had become a first charge on the property and that he was therefore entitled to priority over F. :—

Held, that the plaintiff was not entitled to priority, on the following grounds :—1. That, owing to a common mistake induced by the misconduct of the mortgagor, the deeds as framed did not express the true bargain between the parties, which was that F. should have a first mortgage on the property, and could have been rectified in the present action if the defendants had counterclaimed for that relief, and that in those circumstances a Court of Equity would not enforce in favour of a volunteer a title based upon deeds framed under a common mistake ; 2. that, F. having acquired in equity the priority of A.'s mortgage by paying the mortgage debt and obtaining the title deeds, the plaintiff could not take advantage of the wrong of the mortgagor, through whom he claimed, to deprive F. of that priority.

Toulmin v. *Steere* (1817) 3 Mer. 210 considered.

Decision of the Court of Appeal [1912] 1 Ch. 735 reversed. WHITELEY *v.* DELANEY
H. L. (E.) 132

MUNICIPAL CORPORATION.
See under CORPORATION.

MUNICIPAL CORPORATIONS ACT, 1882, ss. 139, 143 - - - - - - - 483
See REVENUE. 1.

MUNICIPAL TAXATION — Sewers — Cost of laying—"Total exemption from taxation" — Construction — Halifax City Charter—Appeal from Canada - 992
See PRIVY COUNCIL APPEALS. 18.

NATIONAL SCHOOL.
See under SCHOOL.

NEGLIGENCE — Families Compensation Act, 1911, ss. 3, 5—Fatal Accidents Act, 1846, ss. 1, 3 — Appeal from British Columbia - - - - - 1034
See PRIVY COUNCIL APPEALS. 20.

—— Solicitor and client—Claim for indemnity —Misrepresentation—Improper advice —Fraud—Breach of fiduciary obligation - - - - - - - 932
See SOLICITOR.

NEW SOUTH WALES—Laws of.
See PRIVY COUNCIL APPEALS. 5, 6.

NEW ZEALAND—Laws of.
See PRIVY COUNCIL APPEALS. 30.

NOTICE -Mortgage—Priority—Merger—Reconveyance and new mortgage without notice of intermediate charge—Common mistake - - - - - - 132
See MORTGAGE. 2.

ONTARIO—Laws of—Canada.
See PRIVY COUNCIL APPEALS. 22, 23.

PARLIAMENT—Constitution of the Commonwealth — Royal Commissions—Appeal from Australia - - - - - 237
See PRIVY COUNCIL APPEALS. 4.

PATENT—Letters patent creating province—Appeal from Australia - - 283
See PRIVY COUNCIL APPEALS. 1.

PATERNITY—Acknowledgment of—Workmen's compensation—Posthumous illegitimate child— Dependant—Evidence—Admissibility - - - - - - 733
See EMPLOYER AND WORKMAN. 4.

PAUPERIS—In forma pauperis.
See under IN FORMA PAUPERIS.

PERPETUITY—Will—Bequest to maintain residence—Indefinite period—Remoteness —Appeal from Ontario. - - 215
See PRIVY COUNCIL APPEALS. 23.

PLEADING — Cause of action — Solicitor and client—Claim for indemnity—Misrepresentation—Improper advice—Fraud—Negligence—Breach of fiduciary obligation. - - - - - - - 932
See SOLICITOR.

PLEDGE—*Constructive Delivery—Whisky stored in Distiller's Warehouse — Delivery Order — Company—Mortgage or Charge—Registration—Bill of Sale—Debentures—Trust Deed—Appeal —Competency—Winding-up in Ireland—Appeal by Liquidator without Leave of Court—Spirits Act*, 1880 (43 & 44 *Vict. c.* 24), *ss.* 49, 51, 52, 61 *—Bills of Sale (Ireland) Act*, 1879 (42 & 43 *Vict. c.* 50), *s.* 4—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 151.

Sect. 151 of the Companies (Consolidation) Act, 1908, which enables a liquidator, in the case of a winding-up in Ireland, to bring or defend legal proceedings with the sanction of the Court, does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that no such sanction has been obtained.

The plaintiff advanced moneys to a distillery company on the security of manufactured whisky of the company stored in a warehouse provided by the company on the distillery premises in accordance with the Spirits Act, 1880. Neither the company nor the excise officer could obtain access to the warehouse without the assistance of the other, and the whisky could only be delivered out on presentation to the excise officer of a special form of warrant supplied by the Crown. On the occasion of each advance the company entered the name of the plaintiff in pencil in their stock-book opposite the particulars of the whisky intended to be pledged and delivered to the plaintiff (1.) an ordinary trade invoice and (2.) a document called a warrant, which described the particulars of the whisky and stated that it was deliverable to the plaintiff or his assigns and contained the words "free

PLEDGE—*continued.*

storage." No intimation of the transaction was given to the excise officer.

The plaintiff also advanced moneys to the company upon second debentures issued to him by the company in 1903, but forming part of an issue authorized by the company in 1895 and secured by a trust deed of that year.

Neither the warrants nor the debentures nor the trust deed were registered under s. 14 of the Companies Act, 1900.

In an action by the plaintiff against the company in liquidation and the trustees for the second debenture holders to enforce his securities :—

Held (1.) by Lord Atkinson and Lord Sumner, and *semble* by Earl of Halsbury and Lord Parker of Waddington, that the plaintiff was not entitled to a valid pledge on the whisky comprised in the warrants ; (2.) that, assuming that a pledge was created, it was, within s. 14, sub-s. 1 (*c*), of the Companies Act, 1900, a mortgage or charge created or evidenced by an instrument in writing which if executed by an individual would require registration as a bill of sale, and was consequently void as against the liquidator, for want of registration ; (3.) that the plaintiff was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed.

Ex parte Close (1884) 14 Q. B. D. 386, *In re Cunningham & Co.* (1885) 28 Ch. D. 682, *Ex parte Hubbard* (1866) 17 Q. B. D. 690, and *Charlesworth* v. *Mills* [1892] A. C. 231 distinguished.

The authorities on constructive delivery reviewed by Lord Atkinson.

Decision of the Court of Appeal in Ireland [1912] 1 I. R. 349 reversed on points 1 and 2 and affirmed on point 3. DUBLIN CITY DISTILLERY (GREAT BRUNSWICK STREET, DUBLIN), LIMITED *v.* DOHERTY - - - **H. L. (I.) 823**

POLICE—Glasgow Police Act, 1866, s. 88—Arrest by constable without warrant—Scottish procedure—Issue - - **808**
See FALSE IMPRISONMENT.

POOR RATE.
See under RATES.

POSTHUMOUS ILLEGITIMATE CHILD—Workmen's compensation - - - **733**
See EMPLOYER AND WORKMAN. 4.

POSTPONEMENT—Vesting—Will—Construction - - - - - - **782**
See WILL.

POWERS—Canal—Right of support—Mines and minerals—Notice to stop working—Compulsory powers - - - **820**
See MINE.

PREFERENCE — Company — Winding-up — Bankruptcy—Preferential claim—Obligation to assign debenture in security for debt—Assignation not completed at date of liquidation - - - **311**
See SCOTTISH LAW.

PREFERENCE SHARES—Company—Ordinary shares—Distribution of profits—Rights of shareholders inter se - - **11**
See COMPANY.

PRESUMPTION—Highway—Dedication.
See under HIGHWAY.

PRIORITY—Building society—Banking business—Winding-up—Distribution of assets - - - - - - **398**
See BUILDING SOCIETY.

— Mortgages—Merger—Title based on deeds framed under a common mistake—Yorkshire Registries Act, 1884 - **132**
See MORTGAGE. 2.

PRIVATE STREET WORKS ACT, 1892, ss. 5—8 - - - - - **338**
See STREET.

PRIVILEGE—False imprisonment — Scottish procedure—Issue—Arrest by constable without warrant - - - - **808**
See FALSE IMPRISONMENT.

PRIVY COUNCIL APPEALS — AUSTRALIA —*Boundary of States—Letters Patent creating Province—Degree of Longitude stated as Boundary—Implied Authority of Executives to locate.*

By letters patent, dated February 19, 1836 and made in exercise of powers given by 4 & 5 Will. 4, c. 95, the King in Council erected and established the Province of South Australia (now the appellant State) and declared that its boundary on the east (on which side it adjoined New South Wales) should be the 141st degree of east longitude. Under an agreement between the Governments of New South Wales and South Australia the supposed position of that longitude was marked upon the ground for 123 miles north from the sea, and proclamations were issued in the two Colonies publishing the line so marked as the boundary. This marked line was afterwards extended, under agreement between the two Governments, as far as the river Murray. The Secretary of State for the Colonies approved what had been done. The line so marked was subsequently found to be about 2¼ miles to the west of the true position of the 141st degree. The Colony of Victoria (now the respondent State) was created in 1850 out of part of New South Wales and so that on the west it adjoined South Australia so far north as the river Murray. The appellant State brought an action in the High Court of Australia claiming possession of the land between the boundary agreed and marked as above stated and the 141st degree of east longitude, and for ancillary relief :—

Held that, upon the true construction of the letters patent, it was contemplated that the 141st degree of east longitude should be ascertained and represented upon the surface of the earth, and that there was implied authority given to the Executives of the two Colonies to do such acts as were necessary to that end ; that, upon the facts, the Executives

of the two Colonies had acted within that implied authority, and that the line agreed and marked became and was the boundary between the States ; and that the action was, accordingly, rightly dismissed. STATE OF SOUTH AUSTRALIA *v.* STATE OF VICTORIA - - **P. C. 283**

2. —— **AUSTRALIA**—*Compensation—Grant of Land to Society—Limited Purposes—Resumption—"Value of the land."*

The Government of Queensland granted certain land to the trustees of the Acclimatisation Society of Queensland, to be used only for the purposes of the society, and with a provision that the Government might resume possession on paying "the value of the land." The trustees had power by statute to sell the land, but only to the local authority or to a certain agricultural association, the proceeds to be invested and the income applied to the purposes of the society :—

Held, that upon resumption of the land by the Government the trustees were not entitled to be paid the unrestricted freehold value of the land, but, in accordance with the ordinary rule as to compensation, the value of the land to the trustees on the conditions upon which they held it.

Hilcoat v. *Archbishops of Canterbury and York* (1850) 10 C. B. 327 and *Stebbing* v. *Metropolitan Board of Works* (1870) L. R. 6 Q. B. 37 explained. CORRIE *v.* MACDERMOTT **P. C. 1056**

3. —— **AUSTRALIA**—*Insurance (Life)—Re-insurance—Construction of Policy—Statements Basis of Contract—Settlement of Claim by Re-insured—Liability of Re-insurers.*

By a policy dated January 2, 1908, the respondents insured the life of M. for 5000*l.* with profits, the policy providing that certain written statements made by M. as to his health should be the basis of the contract, and that the policy should be void if they were untrue. By a proposal form of the same date the respondents applied to the appellants to re-insure M.'s life for 5000*l.* This proposal contained a provision that in accepting the risk the appellants did so on the same terms and conditions as those on which the policy had been granted by the respondents, "by whom, in the event of claim, the settlement will be made." The appellants on January 28, 1908, issued a policy of re-insurance for 5000*l.*, but limited to the amount which the respondents should pay irrespective of any bonus. The policy recited that the written statement of M. was the basis of the contract, also that the appellants had agreed to accept the respondents' proposal. M. died in May, 1909, and a claim was made against the respondents by his executrix. The appellants informed the respondents that they had reason to believe that some of the statements made by M. were untrue and warned them that they would not acquiesce in a settlement. The respondents, however, paid 5000*l.* in settlement of the claim and sued the appellants upon the policy of re-insurance. The jury found that certain of M.'s statements were untrue and that he had been guilty of concealment and misrepresentation,

but that the respondents, in settling the claim, had acted reasonably and bona fide :—

Held that, assuming that the provision in the proposal form that a settlement should be effected by the respondents was incorporated in the policy of re-insurance, that provision could not alter the express terms of the policy which warranted the truth of M.'s statements, and that, the jury having found those statements to be false, the appellants were not liable. AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY, LIMITED *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED **P. C. 634**

4. —— **AUSTRALIA**—*Legislative Power of the Commonwealth Parliament—Constitution of the Commonwealth—Royal Commissions—Power to enforce Attendance of Witnesses—Penalties—Ultra vires—Federal Principle of Constitution—Royal Commissions Act*, 1902 (*No.* 12 *of* 1902 *of the Commonwealth*) — *Royal Commissions Act*, 1912 (*No.* 4 *of* 1912 *of the Commonwealth*)—*Commonwealth of Australia Constitution Act*, 1900 (*Imperial*, 63 *&* 64 *Vict. c.* 12), *s.* 9 ; *Constitution, ss.* 51, 107, 128.

The legislative power of the Parliament of the Commonwealth of Australia as defined by s. 51 of the Constitution enacted by the Commonwealth of Australia Constitution Act, 1900, s. 9, is to "make laws for the peace, order, and good government of the Commonwealth with respect to" matters enumerated under thirty-nine heads. Sect. 107 of the Constitution provides that "any power of the Parliament of a Colony which has become or shall become a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or of the admission or establishment of the State, as the case may be." The Royal Commissions Act, 1902, and the Royal Commissions Act, 1912 (constituting together the Royal Commissions Act, 1902—1912), passed by the Parliament of the Commonwealth, purport to give to Royal Commissions issued under letters patent to make any inquiry, power to summon persons to give evidence and to produce documents, and impose penalties for a failure to obey the summons :—

Held, that the Royal Commissions Act, 1902, and the Royal Commissions Act, 1912, are ultra vires and invalid so far as they purport to enable a Royal Commission to compel answers generally to questions or to order the production of documents or otherwise to compel compliance by members of the public with its requisitions. The power to impose new duties on the subjects of, or on people residing in, any individual State was, before the Federation, vested in the Legislature of that State, and the above Acts in the form in which they were passed by the Commonwealth Parliament cannot be brought within the powers which are, by clause 51 of the Constitution, exclusively vested in that Parliament.

The principle of the Constitution of the Commonwealth, embodied in the Act of 1900, is federal in the strict sense of that term, namely,

PRIVY COUNCIL APPEALS—*continued.*

in that the federating States, while agreeing to a delegation of a part of their powers to a common government, preserved in other respects their individual Constitutions unaltered. ATTORNEY - GENERAL FOR THE COMMONWEALTH OF AUSTRALIA *v.* COLONIAL SUGAR REFINING COMPANY, LIMITED - **P. C. 237**

5. —— **AUSTRALIA—NEW SOUTH WALES** —*Land compulsorily taken for Public Works—Costs of Arbitration—Construction of Statute—Public Works Act*, 1912 (*Act* 45 *of* 1912, *New South Wales*), *s.* 118.

Upon the true construction of s. 118 of the Public Works Act, 1912, of New South Wales, where in an arbitration under s. 107 of that Act the sum awarded by the arbitrators is more than that offered by the constructing authority, all the costs of and incidental to the arbitration are to be borne by the constructing authority, even though the sum awarded is more than one-third less than the amount claimed. CHIEF COMMISSIONER OF RAILWAYS AND TRAMWAYS *v.* HUTCHINSON - - - - - **P. C. 581**

6. —— **AUSTRALIA—NEW SOUTH WALES** —*Land resumed by Government—Compensation—Prospective Profits of Business—Public Works Act*, 1900 (*No.* 26 *of* 1900, *New South Wales*).

The compensation payable to the owner of land resumed by the Government under the Public Works Act, 1900, of New South Wales is the amount which a prudent man in the position of the owner would have been willing to give rather than fail to obtain it. The special suitability of the land for a business which the owner carries on elsewhere but intends to transfer to the land resumed, and the savings and additional profits which he will derive from so doing, are elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the land. PASTORAL FINANCE ASSOCIATION, LIMITED *v.* THE MINISTER **P. C. 1083**

7. —— **AUSTRALIA—VICTORIA**—*Revenue—Income Tax—Company formed to realize Assets—Profits of Company—Income Tax Act*, 1903 (*No.* 1819, *State of Victoria*), *s.* 9, *sub-s.* 1.

The respondents were a company formed in 1903 to take over, nurse, develop, and realize the assets of three other companies, which had taken over and partially realized and distributed the respective assets of three Australian banks in liquidation. Payment was made for the assets by the allotment to the three companies of debenture stock and paid-up shares in the respondent company, the amounts allotted being in accordance with the values of the assets in the books of the three companies. The respondents from time to time sold a large part of the assets, including assets in Victoria, at prices which shewed a surplus over the purchase prices. By October, 1909, they had paid off, or bought in the market (partly below the face value), the whole of the debenture stock; in May, 1910, they paid a bonus of 6*d.* per share to the shareholders, and in August, 1910, they distributed debenture stock at the rate of 3*s.* 4*d.* per share. The articles of association provided that no dividend should be paid except out of profits. The Income Tax Act, 1903, s. 9, sub-s. 1, provides that "so far as regards any company liable to pay tax, the income thereof chargeable with tax shall . . . . be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment":—

Held, that the surplus realized by the respondents over the purchase prices paid for the assets sold, after making all just deductions, was profit taxable as income in the following year; (2.) that the respondents were entitled to hold in suspense part of the surplus realized to meet possible losses on other assets, and that under the circumstances the profit was earned, for the purposes of the Act, when distributed to the shareholders; (3.) that the amount of the bonus and the pecuniary value of the debenture stock distributed, so far as they were earned in or derived from Victoria, were taxable as profits under the above Act. COMMISSIONER OF TAXES *v.* MELBOURNE TRUST, LIMITED - **P. C. 1001**

8. —— **AUSTRALIA—VICTORIA** —*Revenue—Income Tax—Income from Personal Exertion—Business carried on by Trustees—Income Tax Act*, 1895 (*No.* 1374, *State of Victoria*), *s.* 2—*Income Tax Act*, 1896 (*No.* 1467, *State of Victoria*), *s.* 4.

Under the provisions of a will, the trustees thereby appointed carried on certain businesses in Victoria which had belonged to the testator and paid to the appellant a fifth share in the annual profit thereby made:—

Held, that in respect of the income so received by the appellant he was entitled to be assessed under the Income Tax Acts, 1895 and 1896, of Victoria, as upon income derived from personal exertion, and that he was wrongly assessed as upon income the produce of property. SYME *v.* COMMISSIONER OF TAXES **P. C. 1013**

9. —— **AUSTRALIA—WESTERN AUSTRALIA** —*Revenue—Duty on Dividend—Distribution of fully-paid Shares—Transfer from Reserve Fund to Capital Account—Liability for Duty—Dividend Duties Act*, 1902 (*Western Australia*, 2 *Edw.* 7, *No.* 32), *ss.* 2 *and* 6—*Dividend Duties Amendment Act*, 1906 (*Western Australia*, 6 *Edw.* 7, *No.* 30), *s.* 2.

The Dividend Duties Act, 1902 (of Western Australia), provides by s. 6 that a company carrying on business in Western Australia and not elsewhere which declares any dividend shall pay a duty equal to one shilling for every twenty shillings of the amount or value of such dividend. Sect. 2 of the above Act, as amended by the Dividend Duties Amendment Act, 1906, s. 2, provides that "dividend" shall include "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors." The appellants, a company within the above statutes, passed resolutions that (1.) the capital of the company should be increased by 101,450*l.* divided into 81,160 new shares of 1*l.* 5*s.*

PRIVY COUNCIL APPEALS —*continued.*

each; (2.) that the sum of 101,450*l.*, being a portion of accumulated profits standing to the credit of the reserve fund, should be transferred to the credit of the share capital account; (3.) that the new shares should be allotted as fully paid up among the shareholders pro rata. The above resolutions were all carried into effect:—

Held, that these transactions were in effect a declaration of a dividend amounting to 101,450*l.* within the Dividend Duties Act, 1902, and that the appellant company was liable to pay duty upon that amount under that Act. SWAN BREWERY COMPANY, LIMITED *v.* THE KING **P. C. 231**

—— British Columbia — Laws of.
See Nos. 20, 21, below.

10. —— BURMA — LOWER BURMA — *Practice of the Judicial Committee—Criminal Proceedings—Appeal in Criminal Matter.*

The practice of the Judicial Committee with regard to appeals in criminal matters as laid down in *Reg.* v. *Joykissen Mookerjee* (1862) 1 Moo. P. C. (N.S.) 272, and in *Falkland Islands Co.* v. *Reg.* (1862) 1 Moo. P. C. (N.S.) 299, has not been altered in any respect by the decisions in *In re Dillet* (1887) 12 App. Cas. 459 and later cases. The Judicial Committee will not interfere with the course of criminal law unless there has been such an infringement of the elementary rights of an accused as has placed him outside the pale of regular law, or unless, within that pale, there has been so manifest a violation of the principles of natural justice that their Lordships are satisfied that both they themselves and, in the absence of the irregularity complained of, the local tribunal would have arrived at a result contrary to that which was come to.

In the present case, *held* that there was no misdirection or improper exclusion of evidence, and that the appeal should be dismissed. ARNOLD *v.* THE KING-EMPEROR - **P. C. 644**

11. —— CANADA—*Arbitration—Contract—Arbitration Clause—Abortive Arbitration Proceedings—Duty of the Court.*

In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive it is the duty of the Court to supply the defect by itself ascertaining the amount due. CAMERON *v.* CUDDY - - - - **P. C. 651**

12. —— CANADA—*Costs—Taxation—Appeal in forma pauperis—Costs of Petition for Special Leave.*

An order of the Judicial Committee giving special leave to appeal in forma pauperis takes effect from the date upon which it is made, and has no effect upon costs incurred before that date. A successful appellant in forma pauperis is consequently entitled to recover the costs of the petition for special leave to appeal upon the ordinary scale as between party and party. LEVINE *v.* SERLING - - - **P. C. 665**

13. —— CANADA—*Fishing Rights—Power to grant—Legislative Authority of Province—Railway Belt —Tidal Waters—Navigable Non-tidal Waters—Territorial Waters—British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92, 109.

In pursuance of the Terms of Union under which British Columbia was admitted into the Union of Provinces constituted by the British North America Act, 1867, the Legislature of that Province by two statutes granted to the Government of the Dominion a strip of public land extending to twenty miles on each side of the railway to be constructed under those terms. This strip of land is known as the railway belt. By the British North America Act, 1867, s. 91, the legislative authority of the Parliament of Canada extends to "(12.) sea coast and inland fisheries," and by s. 92 the Provincial Legislature may exclusively make laws in relation to "(13.) property and civil rights in the Province." In answer to questions submitted to the Supreme Court under the Supreme Court Act (R. S. C., 1906, c. 139), s. 60:—

Held: (1.) It is not competent to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt; so far as those waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament; so far as they are not tidal, whether navigable or not, they are matters of private property and under the grant became vested in the Crown in the right of the Dominion. (2.) It is not competeut to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in the sea, including arms of the sea and estuaries of rivers; the right of fishing in the sea is a public right, not dependent upon any proprietary right, and the Dominion has the exclusive right of legislating with regard to it. (3.) The right of the public to fish in the sea does not depend upon any title in the Crown to the subjacent lands. The question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown, or is merely subject to special powers for protective and police purposes, is not one which belongs to municipal law alone, and it is not at present desirable that any municipal tribunal should pronounce upon it. ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* ATTORNEY GENERAL FOR CANADA; ATTORNEY-GENERAL FOR ONTARIO (INTERVENANT) **P. C. 153**

14. —— CANADA — *Railways — Canadian Railways—Powers of Board of Railway Commissioners—Order authorizing Bridges—Cost of Work—Order against Provincial Railway—Ultra vires—Railway Act* (*R. S. Can.*, 1906, *c.* 37), *ss.* 59, 237, *and* 238—*British North America Act*, 1867 (30 *Vict. c.* 3), *s.* 92, *sub-s.* 10.

The Corporation of the city of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion railway, applied to the Board of Railway Commissioners for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question

PRIVY COUNCIL APPEALS—*continued.*

a railway company, working wholly within the Province under provincial statutory authority, ran tramways. The Board authorized the work and ordered that a part of the cost of construction should be borne by the provincial company, on the ground that that company would benefit by the alteration :—

Held, that the order, so far as it imposed part of the cost of the proposed work upon the provincial railway company, was not within the powers conferred upon the Board of Railway Commissioners by the Railway Act and was invalid. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY *v.* VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY AND VANCOUVER CORPORATION

P. C. 1067

15. —— **CANADA** — *Railways — Traffic between Canada and United States—Joint Tariff — Superseding Tariff — Declaratory Order — Jurisdiction of the Board of Railway Commissioners — Canadian Railways — Railway Act* (*R. S. Can.*, 1906, *c.* 37), *ss.* 321, 336, 338.

Where, in respect of traffic to be carried by a continuous route from a point in the United States into Canada, a joint tariff is filed with the Board of Railway Commissioners under s. 336 of the Railway Act, making use of a classification in use in the United States as permitted by s. 321, sub-s. 4, of that Act, the joint tariff so filed cannot be altered or superseded by a tariff using a classification which is neither one in use in the United States nor one authorized by the Board.

The Board of Railway Commissioners has jurisdiction under s. 26 of the Railway Act to make a declaratory order in reference to a rate illegally charged, although its operation has been withdrawn by the company before the order is made. CANADIAN PACIFIC RAILWAY COMPANY *v.* CANADIAN OIL COMPANIES, LIMITED - - - - - - - **P. C. 1022**

16. —— **CANADA** — *Revenue — Succession Duties—Province of Quebec—Property outside Province — Powers of Provincial Legislature — Direct Taxation—Ultra vires—Quebec Succession Duties Act*, 1892 (55 *&* 56 *Vict. c.* 17), *s.* 1, *art.* 1191b — *Quebec Succession Duties Act*, 1906 (6 *Edw.* 7, *c.* 11), *s.* 1, *arts.* 1191b *and* 1191c—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92.

Held, (1.) that neither the Quebec Succession Duties Act of 1906 nor the Succession Duties Act of that Province passed in 1892 upon its true construction imposes any duty upon the transmission of movable property outside the Province; (2.) that the taxation imposed by the Quebec Succession Duties Act of 1906 is not "direct taxation" within the meaning of the British North America Act, 1867, s. 92, and is consequently ultra vires the Legislature of the Province. COTTON *v.* THE KING - **P. C. 176**

17. —— **CANADA**—*River—Riparian Owners —"Navigable and floatable rivers"—Construction of Grants — Boundaries of Townships — River*

PRIVY COUNCIL APPEALS—*continued.*

floatable for Loose Logs only—Civil Code of Lower Canada, art. 400.

The appellants were the owners of lands on either side of the river Gatineau in the Province of Quebec. The lands were held under grants by letters patent in which they were described as numbered lots in the townships of Low and Denholm. These townships, which were on opposite sides of the river, had been created by letters patent and a proclamation, which, in each case, described the townships as being bounded by the river, but in addition gave detailed boundaries which were stated to start from a post and stone boundary upon the bank of the river, to describe a certain course inland therefrom, then to return to another post and stone boundary at a higher point on the river bank, and "thence along the bank of the river following its sinuosities as it winds and turns to the place of beginning." It was found that the river Gatineau (which was a non-tidal river) was one down which loose logs only could be floated, and not logs in the form of cribs or rafts.

The Civil Code of Lower Canada, art. 400, provides : "Roads and public ways maintainable by the State, navigable and floatable rivers and streams and their banks . . . . and generally all those portions of territory which do not constitute private property are considered as being dependencies of the Crown domain" :—

Held, (1.) that the general descriptions of the townships as being bounded by the river were not varied by the reference to the posts and stone boundaries in the detailed descriptions; (2.) that the river Gatineau, being one down which only loose logs could be floated, was not a part of the Crown domain within art. 400 ; (3.) that the appellants' lands on either side of the river extended ad medium filum aquæ.

Tanguay v. *Canadian Electric Light Co.* (1908) 40 Can. S. C. R. 1 approved. MACLAREN *v.* ATTORNEY-GENERAL FOR QUEBEC - **P. C. 258**

18. —— **CANADA**—*Taxation, Municipal — Sewers — Cost of laying—"Total exemption from taxation"—Construction— Halifax City Charter.*

Under an agreement with the appellant corporation, specially sanctioned by the Legislature, the respondents were entitled to "a total exemption from taxation," for ten years, upon its land and buildings situated in the city. The appellant corporation had power under its charter to raise money by assessment for the general purposes of the city ; the charter also provided that owners of property fronting upon any sewer laid by the corporation should contribute to the cost of its construction according to their frontage :—

Held, that the contribution imposed by the charter in respect of laying sewers was "taxation" within the meaning of the agreement, and that the respondents were accordingly exempt from liability in respect thereof. CITY OF HALIFAX *v.* NOVA SCOTIA CAR WORKS, LIMITED - - - - - - **P. C. 992**

19. —— **CANADA** — *Timber — Trover and Detinue—Jus tertii—Timber Right in Crown Mining Lands — Independent Contractors — Defendants receiving Benefits of Trespass—*

PRIVY COUNCIL APPEALS—*continued.*

Ratification—Crown Timber Act (*R. S. O.*, 1897, *c.* 32), *ss.* 1 *and* 2—*Mines Act* (*R. S. O.*, 1897, *c.* 36), *ss.* 39 *and* 40.

The respondents respectively held a patent and a lease from the Crown of mining lands in Ontario. Under the Mines Act (R. S. O., 1897, c. 36), ss. 39 and 40, the property in all pine trees on lands the subject of a patent or a lease is reserved to the Crown, who may grant licences to cut them, the patentee or lessee having, however, the right to cut them for use for mining purposes and in clearing the ground for cultivation. The appellants, who had a licence from the Crown under the Crown Timber Act (R. S. O., 1897, c. 32) to cut timber upon specified lands, not including the lands held by the respondents, contracted with a firm of cutters to cut timber upon the lands so specified. to manufacture it into railway ties, and to deliver the ties in performance of a contract which the appellants held. The firm, without the knowledge of the appellants, in February, 1909, wrongfully entered upon the respondents' lands, cut pine trees thereon, manufactured ties, and proceeded to deliver them according to their contract. On February 24, 1909, when ordered by the Crown Timber Agent to desist, they had removed all but a few of the ties. On March 6, 1909, the Crown gave permission to the appellants to remove the remaining ties, and subsequently charged them the usual dues in respect of all timber cut by the firm, including the pine trees cut upon the respondents' lands. The respondents did not demand the return of the ties :—

Held (1.) that the property in the pine trees continued in the Crown after they were cut, and that the respondents, if they had possession, were merely bailees for the Crown and could not maintain actions in trover or in detinue against the appellants, who were entitled to rely upon the title of the Crown.

(2.) That the firm were not the servants or agents of the appellants, and that the latter were not by reason of having received the benefit of the pine trees cut liable in trespass for the acts committed by them. EASTERN CONSTRUCTION COMPANY, LIMITED *v.* NATIONAL TRUST COMPANY, LIMITED AND SCHMIDT ; ATTORNEY-GENERAL FOR ONTARIO (INTERVENANT) - - - - **P. C. 197**

20. —— **CANADA—BRITISH COLUMBIA**—*Negligence — Death — Action for Benefit of Family of Deceased — Time for commencing Proceedings — Limitation in Special Act — Families Compensation Act* (*R. S. B. C.*, 1911, *c.* 82), *ss.* 3 *and* 5—*Fatal Accidents Act*, 1846 (9 *&* 10 *Vict. c.* 93), *ss.* 1 *and* 3.

The Families Compensation Act of British Columbia is, save in slight and immaterial respects, in the same terms as the Fatal Accidents Act, 1846 (known as Lord Campbell's Act), and provides that actions thereunder shall be commenced within twelve calendar months of the death of the deceased. The appellants operated a tramway under powers conferred by an Act of the above Province which by s. 60 provided a six months' period of limitation in respect of

PRIVY COUNCIL APPEALS—*continued.*

"actions for indemnity for any damage or injury sustained by reason of the tramway, or the operations of the company."

One of the appellants' tramcars having knocked down and instantly killed a man, the respondent commenced an action against them under the Families Compensation Act for the benefit of the father and mother of the deceased. The action was commenced more than six months but less than twelve months after the accident and death :—

Held, that the cause of action under the Families Compensation Act was a different cause of action from that which the deceased person would have had if he had lived, and was not one to which the limitation section in the appellants' Act applied ; and that the action was accordingly maintainable.

Markey v. *Tolworth Joint Isolation Hospital District Board* [1900] 2 Q. B. 454 disapproved. BRITISH ELECTRIC RAILWAY COMPANY, LIMITED *v.* GENTILE - **P. C. 1034**

21. —— **CANADA—BRITISH COLUMBIA**—*Riparian Owner — Water Rights in British Columbia—Grant from Crown—Water Clauses Consolidation Act*, 1897 (*R. S. B. C.*, 1897, *c.* 190).

In British Columbia the common law right of riparian owners to the undiminished flow of the stream is taken away by legislation of the Province. A riparian owner, therefore, who has no grant of the water rights in the stream, or special statutory title thereto, is not entitled to an injunction restraining the exercise of a grant under the Water Clauses Consolidation Act, 1897, of British Columbia, although that exercise diminishes the flow of water to and past his land. COOK *v.* VANCOUVER CORPORATION **P. C. 1077**

22. —— **CANADA—ONTARIO**—*Railways—Canadian Railways—Compensation for Lands taken—Minerals—Right of Support —Railway Act* (*R. S. Can.*, 1906, *c.* 37), *ss.* 155, 170, *and* 171.

The effect of the Railway Act of Canada (R. S. Can., 1906, c. 37) with regard to the expropriation of land by a railway company differs from that of the Railways Clauses Consolidation Act, 1845, in that under the former Act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line. Under the Canadian Act the owner of minerals is entitled to compensation for the loss arising from the restriction of his rights, without waiting until he wishes to work the minerals ; this compensation is to be ascertained as at the date of the deposit of plans, and once for all. DAVIES *v.* JAMES BAY RAILWAY COMPANY - - - - - - **P. C. 1043**

23. —— **CANADA — ONTARIO** — *Will — Bequest to maintain Residence — Indefinite Period—Remoteness—Perpetuity.*

A testator by his will appointed his son (the appellant) and his two granddaughters as executors and trustees, and devised a dwelling-house and its contents to the appellant subject to each of his said granddaughters being entitled to

PRIVY COUNCIL APPEALS—*continued.*

live therein as a home until she married. The will, after other devises and bequests, bequeathed the residue of the estate to the trustees to be used by them in maintaining the house and premises. It gave them power to make sales of any real estate, the proceeds to be devoted "to maintain my said residence in the manner in which it has been heretofore maintained"; and it further provided that if it should be necessary to sell the house, the residuary estate then remaining was to be equally divided among the several pecuniary legatees under the will:—

Held, that the trust constituted by the will offended against the perpetuity rule and was void. KENNEDY *v.* KENNEDY - - **P. C. 215**

24. —— **CANADA—QUEBEC**—*Infant—Procedure in Quebec—Action against Minor—Nullity of Proceedings— Quebec Code of Civil Procedure, s.* 78.

An action brought against a minor in the Province of Quebec is an absolute nullity under the Code of Civil Procedure of that Province, and cannot be proceeded with upon the minor attaining his majority. LEVINE *v.* SERLING **P. C. 659**

25. —— **CANADA—QUEBEC**—*Land — Compensation — Expropriation of Lands — Water Power—Value to Owners—Statutory Powers.*

The appellants had powers under a statute of the Canadian Parliament to develop water powers in and adjacent to that part of the river St. Lawrence which includes the Cedars Rapids, and to expropriate lands required for that development; they had also obtained a lease of the river bed and the right to construct works therein and to abstract water. The respondents owned two islands, situated in the rapids, and rights, including water rights, over a promontory at the foot of the rapids. The appellants gave the respondents notice of expropriation in respect of the above properties:—

Held, that in assessing the compensation payable to the respondents it was not proper to treat the value to the owners of the lands and rights as a proportional part of the value of the realized undertaking which the appellants were proposing to carry out; that the proper basis for compensation was the amount for which the respondents' lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers.

In re Lucas and Chesterfield Gas and Water Board [1909] 1 K. B. 16 approved and applied. CEDARS RAPIDS MANUFACTURING AND POWER COMPANY *v.* LACOSTE - - - **P. C. 569**

26. —— **CEYLON** — *Practice — Cause of Action—Promissory Note — Consideration for Note—Separate Causes of Action—Ceylon Civil Procedure Code (Ordinance 2 of* 1889), *s.* 34.

Sect. 34 of the Ceylon Civil Procedure Code, 1889, provides that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that a plaintiff cannot afterwards sue for a part of the claim omitted from an action, or (without leave) for another remedy for the same cause of action. The respondent sued upon promissory notes, but the action failed owing to a material alteration in the notes. He afterwards sued to recover a part of the consideration for which the promissory notes had been given:—

Held, that although the claims in the two actions arose out of the same transaction, they were in respect of different causes of action, and that, consequently, the second action was not brought contrary to s. 34 of the Code and could be maintained. PAYANA REENA SAMINATHAN *v.* PANA LANA PALANIAPPA - - **P. C. 618**

—— **CHINA**—Laws of—Hong Kong.
See No. 28, below.

—— **COLUMBIA (BRITISH)**—Laws of.
See Nos. 20, 21, above.

27. —— **GOLD COAST COLONY**—*Concessions in Gold Coast Colony — Certificate of Validity—Demise of Surface—Exclusive Right —Modification of Concession by Certificate— Adjustment of Terms upon Opposition — Concessions Ordinance (No.* 14 *of* 1900), *ss.* 13 *and* 16.

In 1906 the respondents obtained a concession over territory in the Gold Coast Colony; this concession was in the form of a demise and expressly conferred the right (inter alia) to mine and to cut timber for any purposes. In 1909 the appellants obtained a concession over lands which included part of the above-mentioned territory; this concession also was in the form of a demise and conferred on the appellants "exclusive liberty" to mine and to cut timber for mining purposes. The appellants in 1910 obtained a certificate of validity under the Concessions Ordinance, 1900, and subsequently opposed an application made by the respondents for a certificate in respect of their concession:—

Held, that although the appellants' certificated concession was in the form of a demise, and was expressed to give them an exclusive right, it did not preclude the issue of a certificate of validity to the respondents, but that the appellants were entitled to remain parties to the application until the terms of a certificate with such modifications or conditions as would preserve their rights had been settled by the Court under ss. 13 and 16 of the Ordinance. WASSAW EXPLORING SYNDICATE, LIMITED *v.* AFRICAN RUBBER COMPANY, LIMITED - **P. C. 626**

28. —— **HONG KONG** — *Criminal Law — Jurisdiction in China—Afghan enlisted in Indian Regiment — British Subject — China and Corea Order in Council*, 1904 — *Foreign Jurisdiction Act*, 1890 (53 *&* 54 *Vict. c.* 37), *ss.* 1, 4, 6, 9.

The appellant, who was a subject of the Ameer of Afghanistan, was enrolled as a private in the 126th Baluchistan Infantry and made an affirmation of allegiance. On September 4, 1912, while he was serving with a detachment of that regiment on Shameen Island at Canton, a native officer of the regiment was murdered; the appellant was taken into custody on the spot and charged with the murder. Under a warrant

PRIVY COUNCIL APPEALS—*continued.*

issued by a judge of His Majesty's Supreme Court for China, he was removed to Hong Kong, where he was tried by the Supreme Court of that Colony and a jury, and upon conviction was sentenced to death. The jurisdiction of the Supreme Court of China and Corea includes criminal jurisdiction and is conferred by the Foreign Jurisdiction Act, 1890, and the China and Corea Order in Council, 1904. Art. V. of that Order provides as follows: "the jurisdiction conferred by this Order extends to the persons and matters following, in so far as by treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say: (1.) British subjects, as herein defined, within the limits of this Order; . . . (3.) foreigners, in the cases and according to the conditions specified in this Order and not otherwise; (4.) foreigners, with respect to whom any State, King, chief or government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty." Art. III. provides that "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act or otherwise, enjoys His Majesty's protection in China or Corea." Art. L. provides that "where a British subject is accused of an offence the cognizance of which appertains to any Court established under this Order, ... he may be sent for trial to Hong Kong or to Burma."

At the trial uncontradicted evidence was given that the jurisdiction exercised at Canton on Shameen was the same ex-territorial jurisdiction as is exercised throughout China and Corea under the Order in Council, that soldiers in Indian regiments enjoy the protection of His Majesty on Shameen, and that the Court exercises jurisdiction over them. The evidence of the officer in command of the detachment was admitted that ten or fifteen minutes after the murder he said to the appellant, who was then in custody, "Why have you done such a senseless act?" to which the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him." There was a body of other evidence which clearly established the guilt of the appellant, and rendered it very improbable that a jury would have acquitted him if his confession had been excluded:—

Held, (1.) that the evidence established that "by usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton, and that the appellant was a British subject within art. III. of the Order; (2.) that the jurisdiction was not prevented from extending to the appellant as a British subject within art. III. by the words "and not otherwise" in art. V. (3.); (3.) that the Court was not precluded from hearing the evidence which established its jurisdiction by reason of the Foreign Jurisdiction Act, 1890, s. 4, which provides for the decision of a

PRIVY COUNCIL APPEALS—*continued.*

Secretary of State upon the application of the Court; (4.) that the appellant's confession was a voluntary statement in the sense that it was not made either from fear of prejudice or hope of advantage, and that even if it was inadmissible in evidence upon the ground that it was made by him in answer to his officer, in whose custody he was (as to which the law was not settled), its admission, having regard to the other evidence given and to the circumstances of the case, was not such a violation of the principles of natural justice as entitled the appellant, according to the practice of the Board, to have his conviction set aside.

The authorities as to the admission in evidence of a statement made by a prisoner in reply to a person in whose custody he is reviewed.

Makin v. *Attorney-General for New South Wales* [1894] A. C. 57 explained. IBRAHIM *v.* REX - - - - - - - **P. C. 599**

29. —— **JAMAICA** — *Tramway Company — Compulsory Purchase of Land—Necessary for working Tramways—Dwellings for Inspectors—Tramways Law* (*No.* 27 *of* 1895), *s.* 9.

The provision by a tramway company in Jamaica of dwellings and a recreation ground for its European inspectors is not "a work necessary for the working of the tramways" within the meaning of the Tramways Law, 1895, s. 9; the company consequently cannot compulsorily acquire land for that purpose under the provisions of the above-mentioned section. WEST INDIA ELECTRIC COMPANY, LIMITED *v.* KINGSTON CORPORATION - - **P. C. 986**

—— **NEW SOUTH WALES** —Laws of.
See Nos. 5, 6, above.

30. —— **NEW ZEALAND**—*Insurance* (*Life*) *—Law of New Zealand—Waiver of Statutory Provisions—Public Policy—Surrender Value—Construction of Policy—Life Insurance Act*, 1908 (*No.* 105 *of* 1908), *s.* 64.

Sect. 64 of the Life Insurance Act, 1908, of New Zealand provides that: "No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto." A policy issued by the appellant society contained a condition that it should lapse upon non-payment of any premium when due except that, if premiums had been paid for at least three years, there should be automatically granted a paid-up endowment for the amount fixed by a table appended to the policy, or in lieu thereof, at the option of the assured, (1.) the cash value fixed by the table would be paid, or (2.) a paid-up policy granted; by the condition it was further agreed that all right or claim for non-forfeiture or for surrender value other than that provided was waived. In answer to question 10 of Sched. VII. the appellant society stated that it had not agreed to give a cash surrender value, but offered paid-up policies:—

Held, that s. 64 was intended to lay down a

PRIVY COUNCIL APPEALS—*continued.*
rule of public policy and that it was not competent for an assurer or an assured to contract himself out of or to waive its provisions, but that the section did not apply to the policy in question, since the policy did not provide for the payment of any cash surrender value. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* REED - - - **P. C. 587**

—— **ONTARIO**—Laws of—Canada.
See Nos. 22, 23, above.

—— **QUEBEC**—Laws of.
See Nos. 24, 25, above.

31. —— **SEYCHELLES** — *Criminal Law — Embezzlement—Seychelles Penal Code (Order 10 of 1904), s. 216—Nature of Offence—Criminal Intent—Conviction set aside.*

The Seychelles Penal Code provides: "Embezzlement, s. 216 (1.): Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy, to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (prêt à usage) or for any work, with or without a promise of remuneration, with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment, and a fine not exceeding three thousand rupees (Rs.3000)." The appellant was convicted of an offence under the above section:—

Held, (1.) that the offence defined by the above section is not limited to cases in which the accused is under a legal duty to return the specific goods, money, or document delivered to him; to constitute the offence, however, there must have been a wilful appropriation, squandering, or destruction of the property of another.

(2.) That the conviction of the appellant and the sentence upon him should be set aside upon the ground that the facts did not on any just or legal view warrant a conviction, and that justice had gravely and injuriously miscarried. LANIER *v.* THE KING - - - - - - **P. C. 221**

—— **VICTORIA**—Laws of.
See Nos. 7, 8, above.

PROMISSORY NOTE—Consideration for note—Separate cause of action—Appeal from Ceylon - - - - - - **618**
See PRIVY COUNCIL APPEALS. 26.

PUBLIC-HOUSE.
See under LICENSED PREMISES.

PUBLIC POLICY—Insurance (Life)—Law of New Zealand — Waiver of statutory provisions—Surrender value - **587**
See PRIVY COUNCIL APPEALS. 30.

—— Restraint of trade.
See under RESTRAINT OF TRADE.

QUEBEC—Laws of— Canada.
See PRIVY COUNCIL APPEALS. 24, 25.

RAILWAY — *Running Powers for General Traffic—Junction with Owning Company's Line by Third Company for Limited Traffic—Amalgamation of Third Company with Running Company—Right to use Junction for General Traffic — Effect of Amalgamation — Railways Clauses Act*, 1863 (26 & 27 *Vict. c.* 92), *ss.* 38, 39, 41, 55.

In 1897 the Great Central Railway Company, as successors to the Manchester, Sheffield and Lincolnshire Railway Company, acquired general running powers over the Midland Railway Company's branch line from M. to W. The Derbyshire Railway Company, whose line crossed the Midland branch line at S., under a special Act of 1897 constructed a short line (called the S. curve) and a junction connecting their line with the Midland branch line at S., and, under an agreement with the Midland Company, acquired limited running powers over a small portion of the Midland line lying between the junction and a certain colliery for coal traffic to and from the colliery by way of the S. curve and junction. In 1906 the undertaking of the Derbyshire Company was transferred to the Great Central Company under a special Act which incorporated the amalgamation provisions of the Railways Clauses Act, 1863, and the Derbyshire Company was dissolved. The Great Central Company, as owners of the Derbyshire Company's undertaking, claimed the right to bring general traffic over the S. curve and junction and then, by virtue of their general running powers, to pass such traffic over the Midland line between M. and W.:—

Held, that the effect of the amalgamation sections of the Railways Clauses Act, 1863, was to confine the Great Central Company to the exercise of such running powers as the Derbyshire Company possessed at the time of the amalgamation, and that the claim failed.

Decision of the Court of Appeal [1912] 1 Ch. 206 affirmed.

Midland Ry. Co. v. *Great Western Ry. Co.* (1873) L. R. 8 Ch. 841 distinguished.

GREAT CENTRAL RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY - **H. L. (E.) 1**

—— Canadian railways — Compensation for lands taken—Minerals—Right of support - - - - - - - **1043**
See PRIVY COUNCIL APPEALS. 22.

—— Canadian railways—Powers of the Board of Railway Commissioners — Appeals from Canada - - - **1022, 1067**
See PRIVY COUNCIL APPEALS. 14, 15.

RATES—Poor rate — Valuation — Houses and buildings let out in separate tenements —Rateable value — Deductions from gross value - - - - - **870**
See LONDON.

REDEMPTION—Mortgage.
See under MORTGAGE.

REGISTRATION — Company — Mortgage or charge — Bill of sale — Debentures — Winding-up in Ireland — Appeal by liquidator without leave of Court **823**
See PLEDGE.

REMOTENESS — Will — Bequest to maintain residence — Indefinite period — Perpetuity—Appeal from Ontario - **215**
See PRIVY COUNCIL APPEALS. 23.

REPAIR—Highway.
See under HIGHWAY.

—— Way becoming a highway after 1835—Absence of intentional dedication by owner—Whether repairable by inhabitants at large - - - - **102**
See HIGHWAY. 2.

RESIDENCE—Will—Bequest to maintain residence—Indefinite period—Remoteness—Perpetuity—Appeal from Ontario **215**
See PRIVY COUNCIL APPEALS. 23.

RESTRAINT OF TRADE — *Contract — Trade Combination—Public Policy—Illegality—Surrounding Circumstances—Evidence—Pleading.*

Where an action is brought on a contract which is ex facie illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but where the question of illegality depends upon the surrounding circumstances, as a general rule, the Court will not entertain the question unless it is raised by the pleadings.

The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, i.e., agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at the plaintiff company's current selling price and were to be appointed distributors on the same terms as the company's other distributors. The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract. The defendants did not by their defence raise the issue of illegality, but they sought to rely on certain facts and documents admitted in evidence at the trial upon other issues as shewing that the agreement was illegal as against public policy :—

Held that, having regard to the form of the pleadings, the surrounding circumstances could not be looked at for the purpose of determining the illegality of the agreement, and that the agreement was not ex facie illegal.

Decision of the Court of Appeal [1913] 3 K. B. 422 reversed. NORTH WESTERN SALT COMPANY, LIMITED *v.* ELECTROLYTIC ALKALI COMPANY, LIMITED - - **H. L. (E.) 461**

2. —— *Covenant in Restraint of Trade—Construction—Breach—Business of House Agent—"Carrying on Business."*

The plaintiff and defendant formerly carried on the business of house agents in partnership under articles which provided that an outgoing partner should not for a period of ten years from the dissolution of the partnership carry on, or engage or be interested directly or indirectly in, any similar business within a radius of one mile from the partnership premises. The defendant withdrew from the partnership business and started a similar business on his own account at an office outside the prohibited radius. In the course of such business he endeavoured to let two houses within the prohibited radius, and he put up notice boards at these houses directing intending tenants to apply to him at his office and inserted advertisements of these intended lettings in a newspaper :—

Held, that these acts were a breach of the covenant, and an injunction granted.

Turner v. *Evans* (1853) 2 E. & B. 512 followed.

Dicta of Lord Atkinson and Lord Mersey in *Kirkwood* v. *Gadd* [1910] A. C. 422 explained and distinguished.

Decision of the Court of Appeal affirmed. HADSLEY *v.* DAYER-SMITH - **H. L. (E.) 979**

REVENUE—*Income Tax—Loans charged on Undertakings of Corporation — Retention of Income Tax on Interest paid out of Profits brought into Charge — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3 — *Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 139, 143—*Leeds Corporation (General Powers) Act*, 1901 (1 *Edw.* 7, *c. cclv.*), *ss.* 37, 38, 39, 40, 46, 47.

The Leeds Corporation, under a series of Acts of Parliament, owned various undertakings and borrowed large sums of money for the purposes of these undertakings. Interest on loans raised for the purposes of an undertaking owned by the corporation as a municipal corporation was paid out of the revenue of the particular undertaking and the borough fund, which was dependent on the borough rate; and interest on loans raised for the purposes of an undertaking owned by the corporation as an urban sanitary authority was payable out of the revenue of the particular undertaking and the consolidated fund, which was dependent on a separate rate. The Leeds Corporation (General Powers) Act, 1901, s. 37, provided that all loans raised by the corporation for the purposes of its undertakings and properties should be charged indifferently upon such undertakings and properties, and that all such loans, whether raised before or after the passing of the Act, together with the interest thereon, should rank pari passu; and that the provisions of the earlier Acts authorizing the raising of money by the corporation and the granting of securities therefor should be read as though the charge authorized by this section had been the charge authorized by those provisions.

For the year ending April 5, 1903, the corporation was duly assessed to income tax upon the rents and profits, amounting to 270,000*l.*, of its various hereditaments and undertakings. The interest payable on the loans relating to these undertakings amounted to 285,000*l.* (being

REVENUE—*continued.*

15,000*l.* in excess of the rents and profits) and income tax was deducted by the corporation from its payments of interest. The profits of the borough fund undertakings and the borough fund exceeded the amount of interest on the loans relating thereto by 78,000*l.*, but the profits of the consolidated fund undertakings and the consolidated fund were less than the interest on the loans relating thereto by 93,000*l.* In accounting to the Crown the corporation claimed that by virtue of the Act of 1901 the entirety of the profits from its various undertakings and hereditaments was chargeable generally with the payment of interest on the whole of its loans, and that it was therefore entitled to retain the whole amount deducted for income tax except in respect of the 15,000*l.*, the excess of interest over profits :—

Held, that the Act of 1901 did not authorize the corporation to apply the surplus on the borough fund undertakings in paying interest on the consolidated fund undertakings, and that the corporation was therefore assessable to income tax in respect of the further sum of 78,000*l.* in addition to the 15,000*l.*, i.e., in respect of the 93,000*l.*

Decision of the Court of Appeal reversed.

Per Viscount Haldane L.C. : Under the Income Tax Acts, where the tax is payable on income arising from the profits of property or undertakings and out of these profits annual payments have been in substance and properly made, the person entitled to such profits, whatever in point of form may have been the way in which he has kept his accounts, is still charged with tax on the whole of his profits, but he is bound to deduct the tax due from the recipient in respect of the annual payments, and, as he has himself already paid tax on the whole profits, he is entitled to retain for himself the amount so deducted. If, on the other hand, the annual payments were not really and properly made out of profits, he is treated as having received these profits undiminished, and, though still bound to deduct the tax from what he has to pay the creditor, he must account to the Crown for what has been so deducted. It is not enough to entitle him to retain the amount of tax deducted from the annual payments that he has a merely contingent or ineffective right to pay out of the profits.

London County Council v. *Attorney-General* [1901] A. C. 26, *Attorney-General* v. *London County Council* [1907] A. C. 131, and *Edinburgh Life Assurance Co.* v. *Lord Advocate* [1910] A. C. 143 discussed. SUGDEN (SURVEYOR OF TAXES) *v.* LEEDS CORPORATION

H. L. (E.) 483

2. —— *Increment Value Duty—Occasional Site Value — Sale of Fee Simple — Mode of Calculation—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 2, 25.

Sect. 2, sub-s. 2, of the Finance (1909-10) Act, 1910, provides that the site value of land for the purposes of increment value duty on the occasion of a sale shall be taken to be the value of the consideration for the transfer subject to the like deductions as are made in Part I. of the Act as to valuation for the purpose of arriving at the site value of land from the total value :—

Held by Viscount Haldane L.C. and Lord Shaw of Dunfermline (affirming the decision of the Court of Appeal), that in making these deductions the gross value and total value were to be ascertained by valuation as provided by s. 25 of the Act.

Held by Lord Moulton and Lord Parmoor, that the gross value and total value were to be ascertained by reference to the consideration.

In 1910 the appellant sold the fee simple of a house subject to tithe of a capital value of 33*l.* for 750*l.* At the time of the sale the estimated gross value and the full site value were the same as in the provisional valuation, namely, 658*l.* and 228*l.* The original assessable site value was 105*l.* A deduction of 90*l.* was allowable for expenditure on the land :—

Held by Viscount Haldane L.C. and Lord Shaw of Dunfermline (affirming the decision of the Court of Appeal), that the proper mode of calculating the increment value under the Act was to deduct from the purchase price of 750*l.* the difference between the 228*l.* full site value and the 658*l.* gross value, namely, 430*l.*, plus the 90*l.*, leaving 230*l.* or an excess of 125*l.* over the assessable site value of 105*l.* ; and that therefore increment value duty was payable on the sum of 125*l.*

Held by Lord Moulton and Lord Parmoor, that the gross value was to be taken to be the purchase price plus the value of the tithe, namely, 783*l.*, and that the deductions should proceed on that footing, with the result that the occasional site value was the same as the original assessable site value and no increment value duty was payable.

Decision of the Court of Appeal [1913] 3 K. B. 809 affirmed. LUMSDEN *v.* INLAND REVENUE COMMISSIONERS - **H. L. (E.) 877**

3. —— *Reversion Duty—Determination of Lease—Value of Benefit accruing to Lessor—Total Value of Land — Licensed Premises — Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 13, 25.

In estimating the total value of land for the purpose of assessing the reversion duty payable under s. 13 of the Finance (1909-10) Act, 1910, on the determination of a lease, the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration.

Decision of the Court of Appeal [1913] 2 K. B. 593 affirmed. EARL FITZWILLIAM *v.* INLAND REVENUE COMMISSIONERS

H. L. (E.) 753

4. —— *Settlement Estate Duty — Property passing on Death—Settlement—Death of Settlor within Three Years—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*) ; *s.* 5, *sub-s.* 1.

By s. 1 of the Finance Act, 1894, estate duty is leviable upon the principal value of all property, settled or not settled, which passes on the death of the deceased.

By s. 2, sub-s. 1, as amended by s. 59 of the Finance (1909-10) Act, 1910, "Property passing

REVENUE—*continued.*
on the death of the deceased shall be deemed to include" (inter alia) property taken under a disposition purporting to act as an immediate gift inter vivos, provided the disposition be made within three years of the death of the disponer.

By s. 5, sub-s. 1, "Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property" a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied :—

Held by Viscount Haldane L.C., Lord Atkinson, and Lord Parker of Waddington, Lord Dunedin dissenting, that the notional passing of property on death introduced by s. 2 did not apply to s. 5, and that the words of the latter section were to be construed in their ordinary and natural sense.

Where therefore the owner of certain property, in consideration of natural love and affection, settled it by deed on his son for life with remainders over and died within three years of the execution of the deed, and the property was liable to estate duty on the death of the settlor :—

Held, that the property did not pass under that disposition on the death of the deceased within the meaning of s. 5, sub-s. 1, and that settlement estate duty was not payable in respect thereof.

Decision of the Court of Appeal [1913] 2 K. B. 606 affirmed. ATTORNEY-GENERAL *v.* MILNE - - - - - - **H. L. (E.) 765**

—— Duty on dividend—Appeal from Western Australia - - - - - - **231**
See PRIVY COUNCIL APPEALS. 9.

—— Income tax—Company formed to realize assets — Profits of company — Appeal from Australia - - - - - **1001**
See PRIVY COUNCIL APPEALS. 7.

—— Income tax—Income from personal exertion —Business carried on by trustees - **1013**
See PRIVY COUNCIL APPEALS. 8.

—— Succession duties—Province of Quebec—Property outside province—Direct taxation—Ultra vires - - - - - **176**
See PRIVY COUNCIL APPEALS. 16.

REVERSION DUTY—Determination of lease—Value of benefit accruing to lessor—Total value of land—Licensed premises
See REVENUE. 3. **753**

RIVER—Riparian Owner—Waterrights in British Columbia—Grant from Crown—Appeal from British Columbia - - **1077**
See PRIVY COUNCIL APPEALS. 21.

—— Riparian owners—"Navigable and floatable rivers"—Construction of grants

RIVER—*continued.*
—River floatable for loose logs only—Appeal from Canada - - - **258**
See PRIVY COUNCIL APPEALS. 17.

ROAD Highway.
See under HIGHWAY.

ROYAL COMMISSIONS—Parliament—Constitution of the Commonwealth — Appeal from Australia - - - - - **237**
See PRIVY COUNCIL APPEALS. 4.

RUNNING POWERS — Railway company — Amalgamation, Effect of - - **1**
See RAILWAY.

SALE OF GOODS— *Contract — Breach — Non-delivery—Measure of Damages.*

A. contracted to sell to W. a cargo of coals to be shipped in November, 1911, at the price of 16*s.* 3*d.* per ton c.i.f. Genoa or certain other specified ports in Italy and failed to deliver the cargo. The contract contained an arbitration clause in respect of all matters arising out of the contract. In October, 1911, W. agreed to sell to G. of Turin a cargo of coals of the same amount and description at 19*s.* per ton c.i.f. Genoa. In November G. sold to A. the cargo he had bought from W. at 20*s.* per ton, and ceded to A. all his rights and liabilities under his contract with W. At the date of A.'s breach of contract the market price of the coal was 23*s.* 6*d.* per ton. A dispute having arisen between W. and A. whether the measure of damages in respect of the non-delivery of the cargo was the difference between the contract price of 16*s.* 3*d.* per ton and the market price at the time of the breach, or the difference between the contract price and the price at which W. sold to G., the matter was referred to arbitration under the terms of the contract. The arbitrator found that W. intended to resell to G. the cargo due to him from A. and appropriated that cargo to his contract with G., and he gave his award in the form of a special case :—

Held, that the arbitrator had no jurisdiction to deal with matters outside the contract, and that the true measure of damages was the difference between the contract price and the market price at the time of the breach.

Rodocanachi v. *Milburn* (1886) 18 Q. B. D. 67 approved.

Decision of the Court of Appeal reversed.

Per Lord Dunedin : In a question of the measure of damages in respect of a breach of a contract for the sale of goods there is a distinction between non-delivery and delayed delivery.

Wertheim v. *Chicoutimi Pulp Co.* [1911] A. C. 301 distinguished. WILLIAMS BROTHERS *v.* ED. T. AGIUS, LIMITED - **H. L. (E.) 510**

SCHOOL—National school—Conveyance of site under the School Sites Act, 1841—Failure of special trust—Scheme for the regulation of the charity - - **20**
See CHARITY.

SCHOOL SITES ACT, 1841 - - - - **20**
See CHARITY.

SCOTTISH LAW — *Company — Winding-up — Bankruptcy — Preferential Claim—Obligation to assign Debenture in Security for Debt—Assignation not completed at Date of Liquidation.*

A Scottish company, which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain goods of the company which the bank held in security, the company should obtain a debenture from an English company, which was indebted to it, and should assign the debenture to the bank in lieu of the surrendered security. The goods were surrendered and the debenture was obtained from the English company, but before it had been assigned to the bank the Scottish company went into liquidation. The bank claimed the debenture on the ground that the company held it for its behoof :—

Held, that the contractual obligation of the company to assign the debenture did not constitute a trust in favour of the bank and that the company was the party beneficially interested in the debenture at the date of the liquidation ; and the claim of the bank rejected.

Dictum of Lord Westbury in *Fleeming* v. *Howden* (1868) L. R. 1 H. L. Sc. 372, at p. 383, considered.

Interlocutors of the Lord Ordinary and the Second Division of the Court of Session in Scotland, 1913 S. C. 255, affirmed. BANK OF SCOTLAND *v.* MACLEOD - - - **H. L. (Sc.) 311**

—— False imprisonment—Scottish procedure—Issue — Arrest by constable without warrant - - - - - **808**
See FALSE IMPRISONMENT.

SETTLEMENT ESTATE DUTY.
See under REVENUE.

SEWERS—Municipal taxation—Cost of laying —"Total exemption from taxation"—Construction—Halifax City Charter—Appeal from Canada - - - **992**
See PRIVY COUNCIL APPEALS. 18.

SEYCHELLES—Laws of - - - - **221**
See PRIVY COUNCIL APPEALS. 31.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SITE VALUE —Revenue—Increment value duty —Occasional site value — Sale of fee simple—Mode of calculation - **877**
See REVENUE. 2.

SOLICITOR — *Solicitor and Client—Claim for Indemnity—Misrepresentation — Improper Advice—Fraud—Negligence—Breach of Fiduciary —Obligation—Pleading—Cause of Action.*

Per Viscount Haldane L.C. : *Derry* v. *Peek* (1889) 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the

SOLICITOR—*continued.*

existence of a fraudulent intention, as, for example, an action for indemnity for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties.

A mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The statement of claim alleged that the defendant, when he gave the advice, well knew that the security would be thereby rendered insufficient and that the advice was not given in good faith, but in the defendant's own interest.

Neville J. found that the charge of fraud was not proved and dismissed the action. The Court of Appeal reversed this finding and granted relief on the footing of fraud :—

Held, (1.) that in the circumstances the Court of Appeal was not justified in reversing the finding of fact of the judge of first instance ; but (2.) that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing.

Decision of the Court of Appeal affirmed on different grounds. NOCTON *v.* LORD ASHBURTON **H. L. (E.) 932**

SOUTH AUSTRALIA.
See PRIVY COUNCIL APPEALS—AUSTRALIA.

SPIRITS ACT, 1880, ss. 49, 51, 52, 61 - **823**
See PLEDGE.

STATUTES :—

I. IMPERIAL STATUTES.

1817.

57 Geo. 3, c. lvi., s. 113—*Union Canal* **820**
See MINE

1835.

5 & 6 Will. 4, c. 50, s. 23—*Highway* - **102**
See HIGHWAY. 2.
See STREET. **338**

1836.

6 & 7 Will. 4, c. 32, s. 1—*Building Societies*
See BUILDING SOCIETY. **398**

1841.

4 & 5 Vict. c. 38—*School Sites* - - - **20**
See CHARITY.

1842.

5 & 6 Vict. c. 35, s. 102—*Income Tax* - **483**
See REVENUE. 1.

1847.

10 & 11 Vict. c. 17, ss. 53, 68—*Waterworks Clauses* - - - - - **379**
See WATER. 2.

STATUTES—*continued.*

1862.

25 Vict. c. xxx., s. 68—*Bristol Waterworks* *See* WATER. 2. **379**

1863.

26 & 27 Vict. c. 92, ss. 38, 39, 41, 55—*Railways Clauses* - - - - - - **1** *See* RAILWAY.

1866.

29 & 30 Vict. c. cclxxiii., s. 88—*Glasgow Police* *See* FALSE IMPRISONMENT. **808**

1869.

32 & 33 Vict. c. 67, s. 52, Sched. III.—*Valuation (Metropolis)* - - - - - **870** *See* LONDON.

1879.

42 & 43 Vict. c. 50, s. 4—*Bills of Sale (Ireland)* *See* PLEDGE. **823**

1880.

43 & 44 Vict. c. 24, ss. 49, 51, 52, 61—*Spirits* *See* PLEDGE. **823**

1882.

45 & 46 Vict. c. 50, ss. 139, 143—*Municipal Corporations* - - - - **483** *See* REVENUE. 1.

1883.

46 & 47 Vict. c. 38, s. 2—*Trial of Lunatics* **534** *See* CRIMINAL LAW. 1.

1884.

47 & 48 Vict. c. 54, s. 14—*Yorkshire Registries* - - - - - - - **132** *See* MORTGAGE. 2.

1888.

51 & 52 Vict. c. 8, s. 24, sub-s. 3—*Customs and Inland Revenue* - - - - **483** *See* REVENUE. 1.

1890.

53 & 54 Vict. c. 37, ss. 1, 4, 6, 9—*Foreign Jurisdiction* - - - - - **599** *See* PRIVY COUNCIL APPEALS. 28.

1892.

55 & 56 Vict. c. 57, ss. 5—8—*Private Street Works* - - - - - - - **338** *See* STREET.

1894.

57 & 58 Vict. c. 30, s. 2, sub-s. 1 (*c*); s. 5, sub-s. 1—*Finance* - - - **765** *See* REVENUE. 4.

1900.

63 & 64 Vict. c. 12, s. 9—*Commonwealth of Australia Constitution*; Constitution, ss. 51, 107, 128 - - - - **237** *See* PRIVY COUNCIL APPEALS. 4.

63 & 64 Vict. c. 48, s. 14—*Companies* - **823** *See* PLEDGE.

STATUTES—*continued.*

1901.

1 Edw. 7, c. cclv., ss. 37, 38, 39, 40, 46, 47—*Leeds Corporation (General Powers)* *See* REVENUE. 1. **483**

1906.

6 Edw. 7, c. 58, s. 1—*Workmen's Compensation* - - - - - - - **62** *See* EMPLOYER AND WORKMAN. 2.

—— —— s. 1 - - - - - **667, 723** *See* EMPLOYER AND WORKMAN. 1, 3.

—— —— s. 13 - - - - - - **733** *See* EMPLOYER AND WORKMAN. 4.

6 Edw. 7, c. clxxi., ss. 8, 25—*Metropolitan Water Board (Charges)* - - **118** *See* WATER. 1.

1907.

7 Edw. 7, c. 23, s. 3—*Criminal Appeal* - **534** *See* CRIMINAL LAW. 1.

1908.

8 Edw. 7, c. 69, s. 151—*Companies (Consolidation)* - - - - - - **823** *See* PLEDGE.

1910.

10 Edw. 7, c. 8, ss. 1, 2, 25—*Finance* (1909-10) *See* REVENUE. 2. **877**

—— —— ss. 13, 25 - - - - **753** *See* REVENUE. 3.

II. COLONIAL STATUTES.

Australia, Statutes of:

Income Tax Act, 1895 (No. 1374, State of Victoria), s. 2 - - - - **1013** *See* PRIVY COUNCIL APPEALS. 8.

Income Tax Act, 1896 (No. 1467, State of Victoria), s. 4 - - - - **1013** *See* PRIVY COUNCIL APPEALS. 8.

Commonwealth of Australia Constitution Act, 1900 (Imperial, 63 & 64 Vict. c. 12), s. 9; Constitution, ss. 51, 107, 128 - **237** *See* PRIVY COUNCIL APPEALS. 4.

Public Works Act, 1900 (No. 26 of 1900, New South Wales) - - - - **1083** *See* PRIVY COUNCIL APPEALS. 6.

Royal Commissions Act, 1902 (No. 12 of 1902 of the Commonwealth) - - **237** *See* PRIVY COUNCIL APPEALS. 4.

Dividend Duties Act, 1902 (Western Australia, 2 Edw. 7, No. 32), ss. 2, 6 - - **231** *See* PRIVY COUNCIL APPEALS. 9.

Income Tax Act, 1903 (No. 1819, State of Victoria), s. 9, sub-s. 1 - - **1001** *See* PRIVY COUNCIL APPEALS. 7.

Dividend Duties Amendment Act, 1906 (Western Australia, 6 Edw. 7, No. 30), s. 2 - - - - - - - **231** *See* PRIVY COUNCIL APPEALS. 9.

STATUTES—*continued.*

Royal Commissions Act, 1912 (No. 4 of 1912 of the Commonwealth) - - **237**
See PRIVY COUNCIL APPEALS. 4.

Canada, Statutes of:

British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92, 109 - - - **153**
See PRIVY COUNCIL APPEALS. 13.

—— —— s. 92 - - - - - - **176**
See PRIVY COUNCIL APPEALS. 16.

—— —— s. 92, sub-s. 10 - - - **1067**
See PRIVY COUNCIL APPEALS. 14.

Civil Code of Lower Canada, art. 400 - **258**
See PRIVY COUNCIL APPEALS. 17.

Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), ss. 1, 3 - - - - - - **1034**
See PRIVY COUNCIL APPEALS. 20.

Crown Timber Act (R. S. O., 1897, c. 32), ss. 1, 2 - - - - - - **197**
See PRIVY COUNCIL APPEALS. 19.

Mines Act (R. S. O., 1897, c. 36), ss. 39, 40 **197**
See PRIVY COUNCIL APPEALS. 19.

Water Clauses Consolidation Act, 1897 (R. S. B. C., 1897, c. 190) - - **1077**
See PRIVY COUNCIL APPEALS. 21.

Railway Act (R. S. Can., 1906, c. 37), ss. 59, 237, 238 - - - - - **1067**
See PRIVY COUNCIL APPEALS. 14.

—— —— ss. 155, 170, 171 - - - **1043**
See PRIVY COUNCIL APPEALS. 22.

—— —— ss. 321, 336, 338 - - - **1022**
See PRIVY COUNCIL APPEALS. 15.

Families Compensation Act (R. S. B. C., 1911, c. 82), ss. 3, 5 - - - - **1034**
See PRIVY COUNCIL APPEALS. 20.

Quebec Code of Civil Procedure, s. 78 - **659**
See PRIVY COUNCIL APPEALS. 24.

Quebec Succession Duties Act, 1892 (55 & 56 Vict. c. 17), s. 1, art. 1191b - - **176**
See PRIVY COUNCIL APPEALS. 16.

Quebec Succession Duties Act, 1906 (6 Edw. 7, c. 11), s. 1, arts. 1191b and 1191c - - - - - - - **176**
See PRIVY COUNCIL APPEALS. 16.

Ceylon, Statute of:

Ceylon Civil Procedure Code (Ordinance 2 of 1889), s. 34 - - - - - - **618**
See PRIVY COUNCIL APPEALS. 26.

China and Corea Order:

China and Corea Order in Council, 1904 - **599**
See PRIVY COUNCIL APPEALS. 28.

Gold Coast Colony, Statute of:

Concessions Ordinance (No. 14 of 1900), ss. 13, 16 - - - - - - - **626**
See PRIVY COUNCIL APPEALS. 27.

Jamaica, Statute of:

Tramways Law (No. 27 of 1895), s. 9 - **986**
See PRIVY COUNCIL APPEALS. 29.

STATUTES—*continued.*

New South Wales, Statute of:

Public Works Act, 1912 (Act 45 of 1912, New South Wales), s. 118 - - - **581**
See PRIVY COUNCIL APPEALS. 5.

New Zealand, Statute of:

Life Insurance Act, 1908 (No. 105 of 1908), s. 64 - - - - - - - **587**
See PRIVY COUNCIL APPEALS. 30.

Seychelles, Statute of:

Seychelles Penal Code (Order 10 of 1904), s. 216 - - - - - - - **221**
See PRIVY COUNCIL APPEALS. 31.

STREET — *Private Street Works — Highway repairable by Inhabitants at large—Dedication of Private Carriage Road as Highway for Foot Passengers—Long User—Presumption in favour of Dedication—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5—8; *Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 23.

Per Lord Atkinson: Proof of long, continuous, and uninterrupted user of a way by the public, though it is evidence from which dedication may be inferred, does not create a præsumptio juris in favour of dedication which, unless rebutted, must prevail.

Turner v. *Walsh* (1881) 6 App. Cas. 636 is not an authority to the contrary.

An objection to a provisional apportionment in respect of certain proposed private street works on the ground that the street in question was a highway repairable by the inhabitants at large was overruled by the justices of the borough, subject to a case stated for the opinion of the King's Bench Division. By a private estate Act of 1825 R., a tenant for life of settled lands, was empowered to let the lands on building leases and to set out a competent part thereof for public squares, roads, streets or otherwise for the convenience of the occupiers of the houses to be erected thereon. The road in question was made by R. in 1827 on waste land over which the public had previously been allowed to wander, and, on the completion of the road, residential houses were built along its course. It did not appear that the road was required for any other purpose than the use of the occupiers of the houses. A toll gate and a bar were placed across the road, but with a space left on either side for foot passengers, and at the toll gate and bar were notice boards headed "private road." Tolls were charged for horse and wheeled traffic, but there had been a free user of the road by foot passengers for upwards of eighty years without interruption. The road was repaired by the owner and not by the local authority. There had been no formal dedication of the road under the Highway Act, 1835. Upon these facts the justices came to the conclusion that R. did not intend to dedicate the road as a public highway and that there was in fact no dedication of the road as a highway for foot passengers or otherwise prior to 1836, when the Highway Act, 1835, came into operation; they therefore decided that the road

STREET—*continued.*
was not a highway repairable by the inhabitants at large :—
Held (Earl Loreburn doubting), that there was evidence to support the conclusions of the justices and that the Court had no jurisdiction to interfere with their decision.
Decision of the Court of Appeal reversed.
FOLKESTONE CORPORATION *v.* BROCKMAN
H. L. (E.) 338

SUCCESSION DUTIES—Province of Quebec—Property outside province—Direct taxation—Ultra vires - - - - **176**
See PRIVY COUNCIL APPEALS. 16.

SUPPORT—Canadian railways—Compensation for lands taken—Minerals—Right of support—Appeal from Ontario - **1043**
See PRIVY COUNCIL APPEALS. 22.

—— Compulsory powers—Canal—Right of support—Mines and minerals—Notice to stop working - - - - - **820**
See MINE.

TAXATION—Costs.
See under COSTS.

—— Municipal taxation—Sewers—Cost of laying—Appeal from Canada - - **992**
See PRIVY COUNCIL APPEALS. 18.

TAXES.
See under REVENUE.

TIMBER—Timber rights in Crown mining lands—Crown Timber Act, 1897, ss. 1, 2—Appeal from Canada - - **197**
See PRIVY COUNCIL APPEALS. 19.

TRADE—Restraint of.
See under RESTRAINT OF TRADE.

TRAMWAY—Compulsory purchase of land—Necessary for working tramways—Dwellings for inspectors—Appeal from Jamaica - - - - - **986**
See PRIVY COUNCIL APPEALS. 29.

TRESPASS—Timber rights in Crown mining lands—Appeal from Canada - **197**
See PRIVY COUNCIL APPEALS. 19.

TRIAL OF LUNATICS ACT, 1883, s. 2 - **534**
See CRIMINAL LAW. 1.

TROVER—Timber rights in Crown mining lands—Appeal from Canada - - **197**
See PRIVY COUNCIL APPEALS. 19.

ULTRA VIRES—Building society—Borrowing—Banking business—Winding-up—Distribution of assets—Priorities - **398**
See BUILDING SOCIETY.

—— Revenue—Succession duties—Province of Quebec—Property outside province—Direct taxation - - - - **176**
See PRIVY COUNCIL APPEALS. 16.

UNION CANAL ACT, 1817, s. 113 - - **820**
See MINE.

USER—Highway.
See under HIGHWAY.

VESTING—Postponement—Intestacy—Will—Construction—Realty—Devise—"Nearest male heir"—"Nearest and eldest male relative" - - - **782**
See WILL.

VICTORIA—Laws of.
See PRIVY COUNCIL APPEALS. 7, 8.

WATER—*Supply—London—Charges—Domestic Purposes—Trade Purposes—Public-house—Catering Business—Water used for the Preparation of Luncheons—Metropolitan Water Board (Charges) Act*, 1907 (*7 Edw. 7, c. clxxi.*), *ss.* 8, 25.
Water supplied under the Metropolitan Water Board (Charges) Act, 1907, to the licensee of a public-house where luncheons were served was used for cooking the food and washing up the plates and dishes :—
Held, that the water was used for domestic purposes within the meaning of s. 25 of the Act and must be charged for on that footing.
Decision of the Court of Appeal [1914] 1 K. B. 221 affirmed.
Per Lord Dunedin: The statement of Buckley L.J. that "the test" of domestic purposes "is not whether the water is consumed or used in the course of the trade but whether the user of the water is in its nature domestic" approved. METROPOLITAN WATER BOARD *v.* AVERY - - - - - **H. L. (E.) 118**

2. —— *Water Company—Supply for Domestic Purposes—Workhouse—"Private dwelling-house"—Bristol Waterworks Act*, 1862 (*25 & 26 Vict. c. xxx.*), *s.* 68—*Waterworks Clauses Act*, 1847 (*10 & 11 Vict. c.* 17), *ss.* 53, 68.
A water company, by s. 68 of its special Act (which incorporated the Waterworks Clauses Act, 1847), was required at the request of the owner or occupier to furnish to every occupier of "a private dwelling house or part of a private dwelling house" within the limits therein defined a supply of water for the domestic use of such occupier at water rents based on the annual value of the premises as therein specified. By s. 53 of the Waterworks Clauses Act, 1847, "every owner and occupier of any dwelling house or part of a dwelling house within the limits of the special Act shall when he has" (inter alia) "paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."
The owners and occupiers of certain workhouses within the limits defined by s. 68 of the company's special Act claimed the right to a supply of water to their workhouses for domestic purposes at the rents prescribed by that section :—
Held, upon the construction of s. 68 of the special Act in conjunction with s. 53 of the Waterworks Clauses Act, 1847, that the right to demand a supply of water for domestic purposes

WATER—*continued.*
was limited to private dwelling-houses, and that the claim failed.

Decision of the Court of Appeal [1912] 1 Ch. 846 affirmed. BRISTOL GUARDIANS *v.* BRISTOL WATERWORKS COMPANY
H. L. (E.) 379

—— Riparian owner—Water rights in British Columbia—Grant from Crown—Appeal from British Columbia - - - 1077
See PRIVY COUNCIL APPEALS. 21.

WATERWORKS.
See under WATER.

WATERWORKS CLAUSES ACT, 1847, ss. 53, 68
See WATER. 2. 379

WILL—*Realty—Devise—"Nearest male heir"—"Nearest and eldest male relative"—Vesting—Postponement—Intestacy—Will—Construction.*
The testator, a bachelor, devised real estate in trust for M. for life and after his decease upon trust to convey the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me" he directed his trustee to convey the same "unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate in trust for M. for life, expressing a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value and keeping up the remainder in trust for "my nearest and eldest male relative" who should be such at the death of M.

The respondent Mrs. W. was the heiress-at-law of the testator both at his death and the death of M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin and at the time of M.'s death was

WILL—*continued.*
the appellant, a son of a daughter of the same cousin:—

Held, (1.) that the expression "nearest male heir" was not used in a technical sense as meaning the testator's heir being a male, but meant the testator's nearest male relative; (2.) that the person to take under the devise in remainder was to be ascertained at the death of M., the tenant for life, and that on the death of the latter the real estate vested in the appellant.

Decision of the Court of Appeal [1913] 1 Ch. 376 reversed. LIGHTFOOT *v.* MAYBERY
H. L. (E.) 782

WINDING-UP—Building society.
See under BUILDING SOCIETY.

—— Company.
See under COMPANY.

WORDS—"Carrying on business" - - 979
See RESTRAINT OF TRADE.

—— "Nearest and eldest male relative" - 782
See WILL.

—— "Nearest male heir" - - - 782
See WILL.

—— "Private dwelling house" - - - 379
See WATER. 2.

—— "Taxation" - - - - - - 992
See PRIVY COUNCIL APPEALS. 18.

WORKHOUSE—Water company—Supply for domestic purposes—"Private dwelling house" - - - - - 379
See WATER. 2.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

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